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No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Monday, September 23, 2002

Deposition of

MITCH McCONNELL

* * *

[12] Have you consulted with anyone in preparation for the testimony you're going to be giving today?

A I've consulted with my lawyers.

Q Have you consulted with anyone else?

A No.

Q Thank you. First, I'd like to get into your campaign background. When did you first run for the United States Senate?

A 1984.

Q To your recollection, how much did you raise in that campaign?

A A little under $2 million.

Q Do you remember how much you spent?

A Every penny of it.

Q Did you have an opponent in the primary in that –

A In the primary? There was a token opponent.

Q "Token" meaning what?

[13] A Someone who filed because he liked to see his name in the paper.

Q So did that opponent raise any money?

A I don't remember.

Q Did you have a general election opponent in 1984?

A I did indeed.

Q How much did that opponent raise?

A Oh, this is a guess, but in the range of a half a million dollars more than I.

Q Did that opponent spend every penny of it, to your knowledge?

A I don't recall specifically, but it was a hotly contested race. I don't recall specifically, but it was a very contested race.

Q You won that election; is that right?

A I did.

Q Do you remember the percentage of [14] the vote?

A Three-tenths of 1 percent. About a vote a precinct.

Q Then in 1990, you ran agai n for re-election.

A I did.

Q Did you have a primary opponent then?

A I believe there were – there was one or more token opponents again.

Q How much did you raise for that primary election?

A I don't recall.

Q Overall for the whole general election.

A Overall? Somewhere between 5 and 6 million.

Q Did you have a general election opponent that year?

A I did indeed.

Q Do you remember how much your general election opponent raised?

[15] A I don't. I don't. It was a very contested race. He was very visible.

Q Was it anywhere near your 5 million?

A It was not as much, but I don't recall exactly how much he spent.

Q Then again, this last cycle before this year 1996, do you remember how much you raised for the '96 general election campaign?

A That's the one we were just talking about, wasn't it?

Q 1990, we were talking about.

A Oh, I'm sorry. In '96, I think he raised slightly less than I did in '90, but in the same general range, roughly $5 million.

Q Did you have a primary opponent in '96?

A I believe I had a token opponent.

Q That token opponent raised how much?

[16] A I don't know.

Q Far less than 5 million?

A I'm certain of that, but I don't know. I'm not sure.

Q Did you spend nearly all that money in '96?

A I did.

Q Did you have a general election opponent in '96?

A Well, I thought you were referring to the general election. Yes, we spent virtually all of the money in the general election.

Q Your general election opponent, do you recall how much he or she raised?

A I don't.

Q Was it anywhere near your 5 to 6 million?

A It was certainly enough to be very competitive.

Q In all these races, Senator, that you've been in, were you able to effectively [17] compete in each of them for the office of the United States Senate?

A Well, since I was successful, I think I successfully competed.

Q You were able to get your message out.

A As were my opponents.

Q You had enough money to do that.

A In the dollars of that era, in each of the dollar – as you know, there's been a lot of inflation over the last 18 years. But based upon the cost of campaigning at that

time, both myself and my opponents were able to get their message across.

Q As early as six years ago, you had enough money to get your message out.

A The difficulty was that the increase in cost is so dramatic that after each – over a six-year period, spending the same amount of money buys you considerably less. In other words, you get less [18] opportunity to reach the voters with the same amount of money with the passage of time.

Q I understand that, Senator, but I just want to make sure we're clear here. You said you've been able to effectively compete in each of these races, which includes the most recent one in 1996; is that right?

A Well, I was successful in the race, but I was able to reach fewer voters with the same amount of money in 1996 that I did in 1990.

Q Were you able to purchase television time in 1996?

A I was.

Q Were you able to purchase radio time?

A I believe we did, yes.

Q Were you able to pay for campaign staff in 1996?

A I was.

[19] Q Were you able to pay for printed materials for your campaign in 1996?

A I was.

Q Were you able to conduct mailings to potential voters in 1996?

A I don't believe we did mailings out of the – we probably did some fundraising mailings.

Q Were you able to conduct any get-out-to-vote efforts in 1996?

A That's typically done by the parties.

Q Your campaign did none of that on Election Day?

A My recollection is that that function is typically done by the parties.

Q What percentage of your contributors, Senator, give $1,000 or more to you for your campaigns?

MR. BARAN: I object to the form of the question. Which campaign are you talking about now?

* * *

[(Luke McLoughlin Dep. 23)] THE WITNESS: I believe it was the coding process that took place.

BY MR. ABRAMS:

Q. Would you have coded it as a genuine issue ad?

A. Yes.

Q. Why?

A. The ad's focus is on taxes. It explicitly does not show a preference for either of the two Nevada candidates for Senate.

Q. And had the ad been about taxes but indicated some preference for one of the candidates, would you have then viewed it as a sham issue ad?

A. I'm not sure how to answer that hypothetical.

Q. You're unable to answer?

A. I'm not sure I understand what you're — how you would change this ad to have me answer differently.

Q. Suppose the ad did not contain the name of both candidates, but it simply said call Harry Reid and left Ensign's name off entirely. Would that have made any difference in your coding if you had been involved in that?

So it would be very specific. Suppose

DEPOSITION OF ANGUS MCQUEEN

TAKEN ON BEHALF OF THE INTERVENORS

SEPTEMBER 24, 2002

*****

[113]

(Off the record)

(Video played)

"ANNOUNCER: The following is a paid program of the National Rifle Association.

MR. HESTON: This election could come down to battleground states like Pennsylvania, Michigan, Ohio and Missouri, states with lots of union members where the union vote could decide the outcome. But not all union members will vote as political observers might expect. So we sent **[114]** NRA correspondent Ginny Simone deep into the heart of union country to talk with union members about this election, about the candidates, the issues, and what to them really matters most. Here's Ginny's report.

UNIDENTIFIED SPEAKER: I've been a union member since 1972, and I've been a registered Democrat all my life. I've always just usually voted Democrat straight, but this time around, I -- I can't do it.

UNIDENTIFIED SPEAKER: Basically the union is always, you know, vote Democrat, vote Democrat, vote for Al Gore. Well, I don't see it that way. It's -- you know, I -- I want my freedom, I want to hold onto my guns, I want to vote for Bush.

UNIDENTIFIED SPEAKER: All this union leadership, they send you stuff all the time. I get stuff in the mail, vote for Al Gore, this is what Al Gore stands for. And of course,

George Bush has a -- you know, an X out on his face and this will be the bad guy.

UNIDENTIFIED SPEAKER: I have to vote my heart. My heart says, well, I'm sorry, union. You say endorse this man, I can't do it in good **[115]** conscience.

GINNY SIMONE: Well, Gore's counting on you guys.

UNIDENTIFIED SPEAKER: He can count on who he wants to, but he's not going to get my vote.

UNIDENTIFIED SPEAKER: I believe that the Democrats at one time was a party for the working people. I believe now it's a party who wants to control the working people, not for the working people.

UNIDENTIFIED SPEAKER: My biggest issue probably is Gore's ideas about the Second Amendment, about wanting to take away your -- your freedom to carry a gun. Even though we're out in the country, crime does come out here, car jackings happen, robbery happens. It makes me feel safe. I know I'm safe with it, and it makes me feel safe having it.

GINNY SIMONE: Are there gun owners like yourself who may be registered Democrats who are looking at the race differently because of the current issue? I mean, do you hear them talking about it?

UNIDENTIFIED SPEAKER: Yeah, I know **[116]** that some are. I know that some are very opposed to what Gore has been saying. I know of two that actually changed their parties. They went down and reregistered as Republicans because they were so upset.

UNIDENTIFIED SPEAKER: Look at the crime in this country. I think I should have the basic right to defend not only myself but my family, my home, my castle, if you will. I don't want someone telling me that I can't do that.

UNIDENTIFIED SPEAKER: All the laws that they pass today have really done nothing to deter crime or change the situation. All they've done is interfere with my right as a law-abiding citizen.

UNIDENTIFIED SPEAKER: Al Gore has already stated that he would register all firearms, and I just -- I can't support that type of a philosophy.

UNIDENTIFIED SPEAKER: What concerns me the most is what Steve just said about registering our guns. I don't want to -- I have a hand gun, and I've had NRA training, and I'm a survivor of domestic violence, and I believe in self-protection, and I do not want my guns taken **[117]** away.

UNIDENTIFIED SPEAKER: A loss of my gun rights is what Al Gore represents. There's no ifs, ands, or buts about that. In my mind, this administration -- if Al Gore and his administration is voted in, we will lose firearm rights.

UNIDENTIFIED SPEAKER: Every move they made was a calculated effort to take us further down the road to having to give up our guns.

GINNY SIMONE: But Al Gore says I'm different, I'm a strong supporter.

UNIDENTIFIED SPEAKER: Al Gore, you know, discovered the Love Canal, and Al Gore invented the Internet.

UNIDENTIFIED SPEAKER: I resist a man who wants to take away guns. I would not believe Al Gore for a minute on anything.

GINNY SIMONE: These politicians, they go, I know that guy out there. I understand where he's coming from. Do those politicians in Washington really understand what you mean when you say I don't want you taking away my rights?

UNIDENTIFIED SPEAKER: The politicians in Congress and the politicians in the White **[118]** House don't have a clue what an average American lives through. I drive through a neighborhood now going to work every day that the crime rate has gone through the roof.

UNIDENTIFIED SPEAKER: It scares me to see four more years of this, because it's just more and more of these people in the White House, and that's the way -- that's the

way you lose your rights. You don't lose them all at once. You lose them slowly over time.

UNIDENTIFIED SPEAKER: Al Gore, I can't trust the man, for one. The man is like watching a modern-day version of Dr. Jekyl and Mr. Hyde. He's says one thing out of this side of his mouth and then he goes with the other side. And I just believe he just wants to tear this country apart.

UNIDENTIFIED SPEAKER: I see him as the enemy of gun owners, the enemy of freedom.

GINNY SIMONE: What do you say to that union guy out there that says how could you vote your rights over your job?

UNIDENTIFIED SPEAKER: My rights are most important. My job, I can always find another one. My rights, I can't replace.

UNIDENTIFIED SPEAKER: Yes, it's nice **[119]** being part of my union, it helps protect me. But having my right to bear arms is something that is extremely important to me. It's something that's kind of just been engrained in me.

UNIDENTIFIED SPEAKER: You got to have your freedom. And the Second Amendment is one of them. And you take that away, something else is going to follow right behind it.

UNIDENTIFIED SPEAKER: First off, if a Republican is elected to office, the world's not going to end, the jobs aren't going to go away, unions aren't going to disappear. That's a great myth perpetuated by the Democrats.

UNIDENTIFIED SPEAKER: George Bush isn't going to take away my job as a union job, but I can see Al Gore taking away my freedom for firearms, my Second Amendment rights. I can see that coming. It's there.

UNIDENTIFIED SPEAKER: We wouldn't be Americans if we didn't have firearms.

UNIDENTIFIED SPEAKER: Apparently the people who don't know history are doomed to relive it, and that's

where I see this going. If it weren't for firearms in this country, this country would never have been established as it **[120]** was over 200 years ago.

UNIDENTIFIED SPEAKER: Guns are part of our life, just like a hammer or a saw. And to lose that freedom, to be willing to give that up for our children and our grandchildren, I'm not willing to do that.

UNIDENTIFIED SPEAKER: We grew up with guns. We enjoy guns. I'm going hunting here in a couple of weeks. It's a heritage. It's American heritage.

UNIDENTIFIED SPEAKER: I risked my life to protect the freedoms of all the people, and they're trying to take some of that freedom away from me that I fought for, and I just can't believe that they would do something like that.

UNIDENTIFIED SPEAKER: It is a freedom, and I don't want it taken away. Someone worked very hard to give me that freedom, and I want to keep it, I want to keep it safe.

GINNY SIMONE: When you go to that voting booth in November, what do you think is really at stake?

UNIDENTIFIED SPEAKER: What's at stake? A way of life.

UNIDENTIFIED SPEAKER: The Second **[121]** Amendment is definitely in jeopardy this time, and America better wake up because this is one of our freedoms that we do enjoy, and it's in danger of being gone.

UNIDENTIFIED SPEAKER: You have to vote to keep your country free. You have to vote for the Constitution. That's one of the things on January 20th, when they go up and they swear to uphold the Constitution of the United States, you put that in the background and say it doesn't matter, you know, it's just -- it's crazy.

UNIDENTIFIED SPEAKER: I never thought it would be under attack like it is now. It really hurts me. And Al Gore's definitely going to try to take our rights away from

us, just like they did in Australia, like they did in England. It's very disheartening.

UNIDENTIFIED SPEAKER: The freedoms we do have are very important to me, and when I go in to vote on November 7th, I am going to vote for my freedom first.

*****

[122]

*****

"MR. LAPIERRE: Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No hand gun, no rifle, no shotgun? And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they could have three new judges hand picked by Al Gore if he wins this election. **[123]** Imagine, what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Diane Feinstein do to your gun rights? There'd be nothing you can do. What you think wouldn't matter anymore, because the Supreme Court is the final interpreter of the Constitution.

When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights. So please, call this number now to join the NRA, or just find out how you can help. Thank you.

MR. HESTON: It's only days away, maybe a few hours, the day that the remarkable freedom you enjoy needs you to return that favor on election day. I urge you to protect your freedoms on November 7th. It's one way you can thank the many souls sacrificed in freedom's name over the past couple hundred years. They did their part then so you can do your part now. And that includes carefully considering which candidates promise to defend our freedoms and which candidates promise to diminish or even destroy them.

A good place to start is with the most **[124]** fundamental freedom of them all, the right to keep and bear arms. If you're like most Americans, you believe you have a constitutional right to own a firearm, but Al Gore's top government lawyers say you're wrong.

Quote, the Second Amendment does not extend an individual right to keep and bear arms. It must be considered as settled that there is no personal constitutional right under the Second Amendment to own or use a gun.

Shocked? Amazed? I was. I mean, sure, we've seen the Clinton-Gore administration trying to use the power of the federal government to help sue firearm makers into bankruptcy, but now Al Gore's top government lawyers have argued in federal court that you and I have no individual right to keep and bear arms.

In fact, witnesses reported that Al Gore's federal lawyers said the government can ban or confiscate your guns at will, because they say, quote, the Second Amendment does not extend an individual right to keep and bear arms.

That's chilling, especially when you consider that Al Gore has the power, if he wins the White House, to appoint Supreme Court **[125]** justices who agree with his government lawyers. And the next American president will likely appoint up to four justices to the highest court in the land. Imagine Justices Hillary Clinton, Charlie Schumer, and Diane Feinstein on the U.S. Supreme Court. Imagine how they would agree with Al Gore's government lawyers. And since the Supreme Court is the final interpreter of the Constitution, there's nothing that you or anyone else could do to stop them. When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, what freedom is next?

So whether it's affordable guns or expensive guns, advanced guns or antique guns, Al Gore's Justice Department says they're not protected under the Second Amendment. In fact, Al Gore says, quote, I think that we should ban so-called

junk guns. I think that the kinds of weapons that have no legitimate use for hunting or the kind of weapon that a homeowner would use, I think they should be banned, yes, those kind of weapons.

Now, maybe Mr. Gore's never had to worry about money, but is freedom only for those **[126]** who can afford it? Does the Second Amendment say the right to keep and bear high-priced arms shall not be infringed?

Don't get me wrong. Any firearm so poorly made it's unsafe to operate should be prohibited, and under product liability law, it is. But why should a senior citizen or low income working parent or a single mom or anyone on a fixed budget be denied access to self-defense because they can't afford Al Gore's prices? They shouldn't.

Al Gore's also called for a ban on semi-automatic firearms, saying they, quote, didn't exist in the past. But the truth is, the first semi-automatic pistol was produced 108 years ago.

Mr. Gore's contempt for and ignorance of your gun rights seems boundless. Al Gore says, quote, Incredibly, while 18- to 20-year-olds cannot legally buy a beer, cannot purchase a bottle of wine, cannot order a drink in a bar, they can walk into any gunshop, pawnshop, or gun show in America and buy a hand gun.

That's a lie. The fact is, for more **[127]** than 30 years, federal law has prohibited anyone under 21 from buying a hand gun from a licensed dealer.

But it seems Al Gore would rather pass new laws than enforce the laws we have on the books. In fact, in the first six years of his administration, Al Gore presided over a 44 percent drop in BATF federal gun law prosecutions of violent armed criminals. Yet while he tolerates reduced enforcement of laws against criminals, he wants new laws against gun owners.

Al Gore says, quote, I will fight for a national requirement that every state issue photo licenses for anyone who wants to buy a hand gun.

So to own a firearm in Al Gore's America, you'd be screened by passing the government's test, as if there were an abundance of shooting ranges, honest examiners and unbiased bureaucrats all ready to process millions of gun owners. And if they decided you passed their test, you'd have to be photographed and licensed at regular intervals, all to exercise a freedom that the Constitution says shall not be infringed.

But for Al Gore, that's still not **[128]** enough. Mr. Gore believes, quote, We should limit gun sales to one gun a month.

Since when is constitutional freedom rationed? It can't be. Freedom that can be rationed is freedom that can be revoked. A government given the power to say one a month also has the power to say none a month.

But the worst is this. Besides banning, testing, screening, licensing, and then rationing what little freedom is left, Al Gore wants gun registration. Quote, I believe all gun manufacturers and federally licensed dealers should have to report hand gun sales to a state authority.

Registration is the final fatal blow for firearm freedom, because what Al Gore isn't telling you is that where guns are registered, guns are confiscated.

You don't have to take my word for it. Ask the law abiding citizens of England, Australia, South Africa, Canada, even California. They dutifully lined up to register their guns, and all too soon they lined up to turn in their guns.

So an Al Gore government would seek to **[129]** ban affordable hand guns, ban semi-automatic guns, order government screening to pass their test, require national photo ID's and licenses, limit you to one gun a month, then require your gun be registered with state authorities. And we all know where that leads. All because Al Gore's government insists,

quote, The Second Amendment does not extend an individual right to keep and bear arms.

So what we have in Al Gore is a candidate who wants to ban guns, register guns, ration your right to buy a gun and make you pass tests and apply for a license, all to exercise a constitutional right.

What's more, if elected president, Al Gore may hand pick as many as four U.S. Supreme Court justices who might likely agree with his government lawyers that say you have no individual right under the US Constitution to own a rifle, a hand gun, a shotgun, or any gun.

Other issues may come and go, but no issue is as important as our freedom. And the day of reckoning is at hand. On election day, November 7th, you must choose. Your freedom and the freedoms of future generations will hinge on **[130]** how you choose. So when you go into the voting booth and close the curtain, consider the cost to our way of life when essential liberty is lost. Let's honor the full measure of freedom given to us by those who sacrificed their all. Thank you.

MR. LAPIERRE: Did you know right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No hand gun, no rifle, no shotgun? And when Al Gore's top government lawyers make it to the US Supreme Court to argue their point, they could have three new judges hand picked by Al Gore if he wins this election.

Imagine, what would Supreme Court Justices Hillary Clinton, Charlie Schumer and Diane Feinstein do to your gun rights? There'd be nothing you can do. What you think wouldn't matter anymore, because the Supreme Court is the final interpreter of the Constitution.

When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights. So please,

call this number now to join the NRA, or just find out how you can help. Thank you.["]

Deposition of Martin T. Meehan
(September 25, 2002)

* * *

[51 (11 PCS/NRA 97)] Q. Can you tell me, sir, how an ad that is intended to influence the outcome of a federal [52 (11 PCS/NRA 97)] election gives rise to an appearance of corruption, if it does?

A. Well, it could. It could if you had a member of Congress who was running for reelection in his or her district and special interests opposed to Medicare prescription drug benefit for seniors started running advertisements that were negative advertisements, some of which are ads I have read, and the federal office holder knew that they were funded by interests against a Medicare prescription drug benefit for seniors and also knew that the ads were probably going to raise the candidate's negatives and potentially defeat that person and knew that the interests would take the ads off the air if they would vote or would somehow try to either within committee delay or try to gum up the works for passing a Medicare prescription drug benefit.

I would say in that instance that the advertisement could have a corrupting influence because in that instance, you would have a member of Congress, member of the Senate concerned about a [53 (11 PCS/NRA 97)] negative ad being run and taking an action to try to prevent the negative ad from airing.

That would be an instance where I would think that the advertisement, while the content – when you asked this question earlier, I was trying to specifically answer the question relative to is an ad corrupting, which – not per se, any more than a Diet Coke is corrupting.

But when an ad is having the effect of defeating a federal officeholder and the federal officeholder knows that the ads are being run by a certain interest and then that federal officeholder gives in to those interests, I think that

would be an instance where an ad could have a corrupting influence in the sense that you got a member of Congress to go against his or her constituents.

Q. Let me ask you about that last piece, because the candidate in this example that you have provided would only have to fear the ads if the voters found them persuasive; right? I think –

A. In my experience over 10 years, 99 percent of the federal officeholders who have an ad being [54 (11 PCS/NRA 97)] run by any interest against them in their district are concerned about it.

Q. I didn't mean to cut you off.

A. An ad that's designed to throw mud at a candidate is of concern to anyone who is a federal officeholder.

Q. But is the reason they are concerned is that their constituents may find the message of the ad persuasive?

A. In some instances, yes, the constituents may believe the information that's contained in the ad. Oftentimes, in a 30-second ad it is very difficult to get across any substance. It is very easy to take bits and pieces of information, say something negative about anyone. So yes, 30-second advertisements paid for by either special interest groups or paid for by the political parties can have a negative impact on a federal officeholder.

* * *

[(Rep. Martin Meehan Dep. 124)] harder.' Call. Tell Al Gore to fight to restore the Medicare cuts. Keep the promise. "Help me help those who need it the most."

This was run in 2000, and assume that it was run in the 60 days prior to the general election. And my question to you is do you believe that this ad was intended to promote the candidacy of Al Gore?

(Witness examined the document.)

A. Probably.

Q. Now, let me just move on, because my time is growing short. Have any of your constituents complained to you about the volume of political ads that is visited upon them?

A. Some, yes.

Q. And do you share the concern that there is such a cacophony of negative political ads that it is hard sometimes for candidates to get their message out?

A. I'm of the opinion that 30-second television spots are not the best way to make substantive decisions about policy, about candidates

DEPOSITION OF
REPRESENTATIVE MARTIN T. MEEHAN

Q. The Chamber of Commerce, The Business Roundtable and the other business entities listed on the bottom, out of corporate funds.

A. Well, I think it is certainly meant to influence – it appears to be meant to influence the election.

Q. Right, and my question is is there an appearance of corruption that arises out of this ad, in your opinion?

A. You keep referring to the appearance of corruption arising out of the ads. My view is that the appearance of corruption comes from the totality of the system that allows federal officials to raise unlimited amounts of money and that allows increasingly elections in America to be more about third-party interests and soft money than the individual moneys the candidates raise to spend on elections.

* * *

[*171] Q. And if they did use it for that purpose, then that would be an interest in achieving their ultimate goal of electing their candidates to office?

A. That's right.

Q. And then paragraph 5 states, does it not, "I am not aware of any occasions on which the Democratic Party, at the federal or state level, has sought to lobby members of Congress." Is that still true?

A. It is true in the sense that the parties have never -- I have never had the Democratic National Committee lobby me on an issue.

Meehan Dep. 128, 171

Q. And how about the Massachusetts Democratic Party?

A. Not that I can recall on a specific issue before the Congress, no.

[*172] Q. And are you aware of whether or not the Republican Party at either the federal or state level has sought to lobby members of Congress?

A. They certainly have never lobbied me.

Q. Are you aware of any efforts by them to lobby other members of Congress?

A. Not specifically, no.

Q. Are you aware of Democratic national party committees implying or stating that they would either provide or withhold soft money from a candidate to induce support for the party committee's policies?

A. I seem to recall reading something about Bob Franks not getting Republican Party support for his race to New Jersey for the United States Senate.

Q. I'm sorry. My question was the Democratic national party committees.

A. Not that I recall.

* * *

[*218] A. No, it doesn't, because in the first hypothetical, the party is taking a half a million dollars in soft money. We are trying to limit those unlimited dollars. But if organizations, both Democrat and Republican, ended up -- and

Meehan Dep. 171-172, 218

I don't think they will spend the money that they have contributed in soft money.

But if organizations, both in the Democratic and Republican and Independent and Libertarian and all sides of the spectrum, ended up encouraging their members to get out and vote, to register to vote and participate in elections, then the result would be the number of people voting in America would greatly increase. And I think that would be good for the system.

But what has happened is the soft money has been used largely for 30-second television ads. I know you don't want to get into a dialogue about **[*219]** it, but I make a distinction between get out the vote activities, registering people to vote and 30-second ads that technically qualify to be soft money expenditures because they don't happen to say "vote for" or "vote against."

Q. Fair enough. But the truth is the state parties are restricted under your Act from spending soft money on bread and butter grassroots efforts to mobilize their folks to get out and show up on Election Day, door hangers, vote Democratic bread and butter stuff.

I'm genuinely puzzled why you think that kind of what seems to me basic civic participation raises an appearance of corruption when state parties do it simply because of this indirect benefit for federal candidates.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

Washington, D.C.

Monday, September 9, 2002

Deposition of

JOHN L. OLIVER, III

* * *

[46] happy to have collective information as long as you are representing it's from Bush for President or Bush-Cheney 2000.

MR. BERGER: We are going to do our level best to make sure you get that information, whether it's from him or from me.

(Discussion off the record)

BY MS. DANETZ:

Q Once somebody was an authorized agent of the campaign and had a number, did they indicate in some way that donations were the result of their fund raising efforts to the campaign?

A What do you mean by indicate?

Q In other words – and I'll just, to move this along – press reports have indicated that if somebody raised money and they wanted attribution to their tracking number that they would write the tracking number on the check that they had solicited. Is that accurate?

[47] A Oh, I'm sure there are occasions where individuals indicated on the response device cards.

Q I'm sorry, the –

A A card. The federal law requires you to – I don't know if you have one of those or not. I don't know if there's one in existence.

The Federal Election Law requires you to get the following information when someone gives more than $200. Employer information. The wording – and don't quote me on this – but I think it's best estimates – best efforts to get that information.

Q What was that card called?

A It's a response device.

Q Response device?

A Uh-huh. If you are coming to a state, you've got to mail in a card and tell them you are coming. It's called a response device.

[48] Q So I guess I don't understand. How do tracking numbers relate to the response device card?

A There was a place on the response device where you could put in a tracking number.

Q So if an authorized agent – I guess I'm curious. Why would something sent out from an authorized agent result in a response device card coming back to the campaign?

A Well, if you send out a letter – let's say someone sent out a letter, okay? On behalf of the campaign. Then they would include in that response device – they would

potentially include the response device and an envelope for it to be sent back by Bush for President.

Q When you say someone sent out a letter, you mean an agent of the campaign sent out a letter?

A Uh-huh.

[49] Q To a bunch of people? To who?

A To whomever he or she were soliciting contributions from.

Q So an authorized agent of the campaign would sent out – can I call it a solicitation?

A Sure.

Q So an authorized agent would send out a solicitation to people who they were trying to fund raise from, on behalf of Bush for President; is that accurate?

A Yes.

Q Then included in that letter would be this response device card that you were talking about?

A Sure.

Q In the letter from the agent to whoever was being solicited, would they indicate, you know, my tracking number is X? How did the person who was the target of the solicitation know a particular tracking number to write on the response device card?

[50] A I don't know how they would know. I mean, the response device card may – somebody may have filled it in before they sent in the little the space that said

tracking number, or they could have encouraged people in the body of the letter to put a tracking number on it.

Q Was it a common practice for the agents to write tracking numbers on the response device card?

A I don't know. I don't know if it was a common practice. I'm sure it occurred.

Q Well, by the definition of the word agent – I'm not trying to trick you, I'm really trying to understand here – if they were an agent of the campaign, they are doing it on behalf of the campaign?

A Right.

Q Is that true? You are here today to testify on behalf of the campaign; is that true?

[51] A That's correct.

Q So what I'm trying to understand is, was it a regular practice of the campaign through the particular agents to write a particular tracking number on the response device card that would then be sent back in?

A I think there are people that were authorized agents that did that, yes. I don't know if it was a regular practice of the campaign. It was probably more a practice of the agent, he or she themselves.

Q Do you know, in your capacity as a representative of Bush for President, do you know of other ways that agents conveyed or told the people they were soliciting, this is the tracking number, and I would like you to write it either on your response device card or somewhere else to let the campaign know?

A Sure. People put that in letters as well.

[52] Q I see. So if you know, what would be an example of something that someone would write in a letter?

A You are asking me for speculation. You could put, please put my personal tracking number, you know, 1234, on your checks, as I'm trying to become a Pioneer.

Q Now, when the campaign received checks and/or response device cards, and they had tracking numbers on it, what did they do with that information?

A I think it was – when the checks came in from individuals, they usually came in to – they would come in to one of the staff, and they would be tracked. There would be a computer indication, an entry into a computer, that they had received contribution on behalf – they had received a contribution with that tracking number on it.

Q I see, so was there a spreadsheet of some sort maintained?

[53] A We have produced for you – the lawyers have produced for you our information about how much people's tracking numbers had by them.

Q Right, and I appreciate that and I'm happy to have that document. I don't mean to be glib, but what I'm trying to determine is, if during the campaign there was a spreadsheet maintained that had a tracking number, perhaps other information, and also was used to track the contributions that came in for that particular tracking number.

A Oh, I think there probably – yeah, I don't know if it's a spreadsheet, but I think people kept lists, sure.

Q So I'm trying to understand, how was that information maintained? Who kept those lists?

MR. BERGER: I can help with part of that, because there may be come confusion. The spreadsheet that we produced [54] to you was merged in a document which we created, which was the identity of the Pioneer with the historical spreadsheet maintained by the campaign.

That's where the column in the information that says contributions as of March 31st comes from. That was a contemporaneous document prepared by the campaign, and we merged them for you so that you would have that.

I think the remaining part of your question is, who was responsible within the campaign for maintaining that spreadsheet?

THE WITNESS: Is that right?

MS. DANETZ: Yes.

THE WITNESS: The spreadsheet was kept by – the regional people kept them for individual people in the regions.

BY MS. DANETZ:

Q So again, I'm going to refer back to your individual testimony, and tell me and/or correct me if I'm mischaracterizing [55] it, but I believe you stated that there were four regional people who worked for the campaign; is that correct?

A That's correct.

Q I believe you identified them in your personal deposition; is that correct?

A That's correct.

MR. BERGER: Have their names changed in the last hour?

THE WITNESS: No.

BY MS. DANETZ:

Q They were, just for making it clear –

MR. BERGER: Beth Sturgeon?

THE WITNESS: Yes.

MR. BERGER: Travis Thomas?

THE WITNESS: Yes.

MR. BONIFAZ: Mary Kay Kelly, now Johnson?

THE WITNESS: Kelly, now Johnson.

MR. BERGER: Heather Larison?

THE WITNESS: Yes.

[56] BY MS. DANETZ:

Q So those were the four regional people that would have maintained spreadsheets for agents from their particular region?

A Sure.

Q This might go back to my confusion, so feel free to jump in if necessary.

Was there a form of how the spreadsheet was maintained? In other words, did they all maintain the same information within their respective spreadsheets?

A I don't know what particulars they kept within their individual spreadsheets. A lot of people kept their own list, too. A lot of the individual people who wanted to be Pioneers kept a list, too.

Q I want to go to Exhibit 2 again.

A This one?

Q Yes.

A Okay.

[57] Q There's a lot of information asked for in this document, and if you notice about halfway down, the form asks for the industry; is that correct?

A That's correct.

Q Could you tell me why the Bush Exploratory Committee and also the Bush for President, Inc. asked what industry the particular agent was affiliated with?

A For purposes of probably knowledge of what industry they were involved in.

Q Well, right, but I mean, I'm assuming that the campaign didn't ask for extraneous information, so I'm just wondering what particular interest the campaign had in the industry.

So for example, just by way of explanation, I can understand why it's of interest to the campaign that in this case – and correct me if I'm wrong – Peter Adams

pledged to try to raise $100,000 by September 1st, because the campaign was

* * *

[106] them.

Q Did individuals associated with the oil industry come to the campaign to reach out to members of the oil industry?

A I'm sure there were individuals who happened to be involved in the oil industry that raised resources for the campaign and, in doing so, talked to the people that they knew.

Q Were these tracking numbers helpful in understanding how those different kinds of efforts were going?

A The tracking numbers were for the purpose of being able to tell individuals and tracking what individuals did themselves as individuals.

Q Were they also helpful for that effort, to reach out to different industries?

MR. BERGER: Objection, ambiguous, but you may answer.

THE WITNESS: I don't know if they

* * *

[(Daniel Seltz Dep. 187)] you look?

A. I would ask Ken or Jon if they had it in their files.

Q. Was there any consideration given to giving the coders the option to answer question 6 both?

A. I don't remember conversations specific to number 6. I know that there was — one of the things I learned in doing this is there are times when you want to force the coder to make a decision and times where you want to be able to give the coder a third choice like the unsure unclear option here so my understanding was that this was — I don't remember conversations about the work, the particular wording of this question, I wasn't part of it.

Q. You will agree, won't you, you reviewed all the storyboards for the issue ads in 1998, haven't you, Mr. Seltz, have you?

A. Every single one?

Q. Yes.

A. I looked at the vast majority.

Q. You will agree there are many

Q. So when you refer to specific tables, we are not to understand that to mean that you are citing those tables as authority?

A. Here they are authority with respect to public attitudes with respect to corruption. The question is actually referring to corruption directly in the tables.

Q. So tables 3.1 to 3.9 are the support that you are citing for this statement?

A. Yes.

Q. Based on your review of the data, are you aware of any public opinion data that indicates to you that the BCRA will have the effect of reducing the appearance of corruption?

MS. PATTERSON: Objection to the form of the question.

THE WITNESS: Would you repeat that again, please.

BY MR. KELNER:

Q. Sure. Based on your review of the data, are you aware of any public opinion data that indicates to you that the BCRA will reduce the appearance of corruption?

[*115] MS. PATTERSON: Same objection.

THE WITNESS: There is no way to tell from the current, from the current data.

BY MR. KELNER:

Q. So is your answer to that question no?

MS. PATTERSON: If you could allow the witness to finish his response before you ask him another question.

BY MR. KELNER:

Q. I'm sorry. Were you not finished?

A. No. I wasn't finished. There is no way to do -- the data don't directly address what the future will look like because the future that we're about involves changes that are, that haven't occurred yet.

Q. And do I correctly understand, therefore, that you are not aware of any data that indicates that the BCRA will reduce the appearance of corruption?

A. No. No public opinion survey data of the sort that I have sought to find because the, the kind of data that you want, I haven't come across the data that would satisfy me to answer your question, that would deal directly with it.

Q. And so you as an expert on public opinion, **[*116]** just so I understand, have no basis for concluding that the BCRA will reduce the appearance of corruption?

MS. PATTERSON: Object to form and mischaracterizing testimony.

MR. KESSELMAN: Object.

THE WITNESS: I haven't seen any data. There are no available data that would enable me to answer that question.

BY MR. KELNER:

Q. I'm not sure you are answering my question when you put it that way.

A. Ask the question again and I'll try to give you a yes or a no.

Q. I'm trying to get a clear answer on this so that I can understand your position. And what I want to know is whether you are aware of any basis in your capacity as an expert on public opinion for believing that the BCRA will reduce the appearance of corruption?

MS. PATTERSON: Object as to form and to the extent it mischaracterizes previous testimony.

THE WITNESS: No data directly. In answer to one of your previous questions, based on theories about public opinion change, you can speculate, **[*117]** imagine under scenarios under which that would quite readily occur. But in terms of the answer to your original question, no based on the data.

BY MR. KELNER:

Q. Let me go back to something that counsel and I have discussed during one of the breaks, which is the topic that I raised at the beginning of the deposition. I understand you testified this morning that you were contacted in July, you think, by Mr. Kesselman, with regard to your being engaged as an expert witness in this case?

A. Yes.

Q. How many times, if you recall, did you meet with counsel after that initial conversation through today?

A. First time I met counsel was yesterday. So I did not meet them at all.

Q. Have you communicated with counsel?

A. Yes. We have communicated by telephone and by e-mail.

Q. And which attorneys were you communicating with?

A. I was communicating with Marc Kesselman and then with Krisan Patterson and then -- somebody else from this firm. Whitner?

DEPOSITION OF
REPRESENTATIVE CHRISTOPHER SHAYS

Q. In what ways would raising the soft money as you have just described, if you had actually appealed for the soft money, in what ways would that have corrupted you?

A. In what ways do I think it corrupts all of us?

Q. Yes.

A. Because the money is large and it is unlimited and it is, in my judgment, against the law.

It has been against the law since 1907, and I believe that, even though the FEC has allowed this, I believe the intent has become so distorted. It was for educational purposes. It was not to help defeat or elect a candidate.

There is no one in Congress that I know of who will tell you that when we raise this money, it is for educational purposes. We all **[*41]** know it is to be used to help our colleagues who are in trouble to defeat a person who is running against a Republican, in my case, or to help elect them. We all know it. There is not a person in Congress who doesn't know it. Yet, it has been against the law since 1907.

Now, I am using corporate treasury money because that is mostly what Republicans seem to do. The Democrats get corporate money and they get union dues money.

I am outraged that my wife, when she was in Connecticut, was a member the CEA, and her money that she gave --

Q. What is that?

A. The Connecticut Education Association, and she was a member of the New Canaan Education Association.

She paid dues, and some of her union dues were used to help the Democratic candidate for Governor. It was not a Federal election. I was up for election at the same time as the State Representative.

[*42] Her money was used to help a Democrat who she opposed. She supported a candidate named Leroe (phonetic). What she had to do was go to her union and basically tell them she didn't want her union dues money. What happened, because of the law, was she had to leave the union, her union dues money, and she had to pay an agency fee.

It has always been eating at me that her union dues money was used to help an opponent who she opposed, who I opposed, and who, in the process of using her money, was helping the candidate who was on the same election cycle.

So, I have always thought about this and thought if I had a chance, I would want dearly to make sure we enforce the 1907 law and the 1947 law and make sure no union member has to see his union dues money go to a candidate they oppose.

Now, if that union wants to help a particular candidate, have a political action committee and ask the members to voluntarily give. My wife would not have objected if they had done that in Connecticut. She would not have given to **[*43]** that political action committee.

I am going to just say to you one of the things that has astounded me about my own Republican Party. They

say they want union dues money to be voluntary, but they voted against a law, excuse me, union dues money not to be voluntarily; I want to say it correctly.

They said no one should be forced to give to a candidate through union dues they oppose, but when they had a chance to vote for a bill -- some of my colleagues, particularly my leadership -- that would have carried out that wish and enforced the 1907 law, amazingly, some of my Republicans voted against it. It is just something I have a hard time wrestling with.

Q. Congressman, I take it from your answer that the corrupting influence of corporate or union treasury money is that it is unlike PAC money because it is not contributed to the corporate treasury or the union treasury by the donor for the specific purpose of political activity.

[(Rep. Christopher Shays Dep. 111)] position. In this case, I have a bit of an advantage. I know John Ensign is for cutting taxes, and I know Harry Reid is not usually. That is a bias I have as a Republican, but I believe it to be true.

If this ran, it would clearly be under our law, and I think it is reasonable. It would be under our law because I think it agrees probably with one person's position, but not the other. I think it is designed to influence the election, frankly.

Q. On whose behalf or to whose favor do you believe this was designed to influence the election?

A. I would not know unless I was in Nevada and knew the group, so I am speculating in this case. My speculation is this was probably designed to help John Ensign. I could be wrong, but it was probably designed to help him.

In either case, even if I am wrong, it is designed to impact the outcome of the election. So, it would be a campaign ad and should be used

[(Rep. Christopher Shays Dep. 128)]

react to it.

No; I bring the context of my somewhat knowledge of the race, and I believe Al Gore was criticizing me and every Republican for making Medicare cuts and that he was the champion of Medicare.

So, I am pretty comfortable, I think, telling you this is clearly designed to benefit Al Gore. I could be wrong on that, but it does mention his name and it would be defined as a campaign ad.

- - -

(Whereupon a document was marked as Shays Deposition Exhibit Number 9.)

- - -

BY MR. COOPER:

Q. Another story board.

A. (Reading) McCain: For years, special interests and big money have had a negative influence on local, state, and national elections. Arizona's Clean Election Law changes that. In 1998, you voted for the Clean Elections Act and

CROSS-EXAMINATION OF REPRESENTATIVE CHRISTOPHER SHAYS

Q. Have pollsters, perhaps Mr. Luntz or others, indicated to you that, in terms of statistical validity and ability to project to the population as a whole, the self-selected response rate of something on the order of six and a quarter percent would probably not be fairly projectable to the entire population?

A. They would tell me that statistically it would not be what a professional pollster would depend on, but they did express appreciation that so many people did respond. In other words, they felt that we got a good response. So, as Congressional polls go, they thought it was a very good poll.

Q. Let's turn back, if we could now, to the RNC gala. I am now informed that the 2002 RNC gala was at the D.C. Convention Center. Does that ring a bell?

A. I've been to that convention center, but I don't think I've been in the last two years. I may have. I know I was scheduled to go, but I don't think I went. I do go -- I did go to -- as you were asking the question, I did go recently to the one on **[*11]** Connecticut Avenue at the Hilton which was honoring J. C. Watts.

Q. And when was that?

A. That was, gosh, jut a few weeks ago, J. C. Watts and Dick Armey.

Q. Was that a fund-raiser?

A. Absolutely.

Q. Were you asked to raise money for that event?

A. You know, that one I was not asked to raise money for. And let me say that the one that I was asked to raise money and which they gave me a list of soft money at the Presidential dinner in which we then responded by raising hard money, I would have gone had I been in Washington. I wasn't in Washington. But I would gladly have gone.

Q. With regard to the one recently at the Hilton honoring J. C. Watts, was that a fund-raiser for both hard and soft money to your knowledge?

A. I would think it had to have been. I will say that the focus was on hard money. It was a real effort, I think they raised like 6 million. And I think most of it was hard money, but not all of it. But it was I think an effort to raise hard money.

Q. Was that the fund-raiser with Mayor **[*12]** Guiliani as the headliner or was that a different one?

A. I think that was a different one.

Q. Sticking with the one at which J. C. Watts was honored, was it a sit-down dinner?

A. Correct.

Q. Do you recall anyone you sat with at that dinner?

A. I sat down with -- I do recall. I sat down with a member who I would have to look at my membership list to remember who it was. I sat down with one member who couldn't find his own seat and joined us. It was a --

Q. I think that should go without comment.

A. Thank you. I appreciate that.

MR. WITTEN: Anybody want to seal that portion of the transcript.

BY MR. BURCHFIELD:

Q. This was a Democrat, right, Congressman, who found the wrong fund-raiser too.

A. There were two families there. They were as I recall thrilled that they were sitting next to a member of Congress. And I felt very good that they felt that way. They had Indian background. They both had married Indian wives, who had found their **[*13]** wives going to India. And one of them had a precious child who probably was five years old who was there.

So it was I think either two families that were related, either the two brothers were related, the two men were related as brothers, and then their two wives and their daughter. And someone else during the course of the dinner sat down. But -- and I don't frankly remember their names.

I don't think I saw a list of who I was sitting with. And I will just tell you, I was kind of pleased because at this dinner I was more in the middle of the event. Usually, when I go, I'm kind of stuck out in the outer reaches. So I felt kind of pleased that I had a decent seat this time. I remember that event, it was a lovely event.

MR. BURCHFIELD: Let me ask the reporter to mark as Shays Cross-examination Exhibit 2 the seating chart from the May 2002 RNC gala which indicates that you were assigned a seat. That doesn't necessarily mean obviously that you attended, but I just want to ask you a couple questions about this.

THE WITNESS: You know, I would be able to answer the question if you give me the date, I could call my staff and they could tell me if I was at the **[*14]** event, if that would be helpful.

BY MR. BURCHFIELD:

Q. If that would -- it's up to you.

A. Would you mind if I did that.

Q. No, I'm fine with that.

A. The date again was May?

Q. May 14, 2002.

A. Of this year?

Q. Of this year.

A. I will just ask them.

MR. WITTEN: We'll go off the record.

(Discussion off the record.)

(Shays CX Exhibit No. 2 was marked for identification.)

BY MR. BURCHFIELD:

Q. Congressman, we put in front of you the seating chart which indicates, if you look, the names are alphabetized thankfully. So on page 39 you will see your name assigned to table 314.

I'm sorry, I meant to give you a copy of this.

MR. WITTEN: Thank you.

THE WITNESS: Let me use his so I can mark it up.

On page 39. Okay. C. Shays. That's [*15] interesting.

MR. WITTEN: He's pointing you to table ten.

BY MR. BURCHFIELD:

Q. It's table 314, seat ten. And you will see the schematic for the seating arrangements on the front page of this. And you were in the lower left-hand quadrant in the second -- middle of the second row, if you were there. And let me just -- we have the advantage, Congressman, of being able to ascertain what other people were assigned to your table. And let me just ask you about these names and see if any of them ring a bell.

A. Sure.

Q. Perhaps maybe, if your staff calls back, they can confirm that you were here. But, on the first page, one of 96, the first page of names. Maureen Agron was assigned to table 314.

A. Okay.

Q. Does that ring any bell?

A. No.

Q. The next page, Jane Anderson?

A. Okay.

Q. No bell?

A. No, it doesn't ring a bell.

[*16] Q. Page 16, Jay and John Froshaug?

A. That doesn't ring a bell.

Q. Page 20, Barbara Hayes and Jim Hayes who I take it are not spouses?

A. Okay.

Q. It doesn't ring a bell?

A. No.

Q. Page 22, John Hysom, H-y-s-o-m?

A. Is this the place you have to go up the escalator to go to the second floor in the convention center?

Q. I believe that's right.

A. I'm not sure I was there. I'm going to have you speak to my staff when she gets back directly without me even talking to her.

Q. All right. And the last person that we found assigned to that table was on page 30, Lloyd Moore. Still no recollection?

A. No. You know, I'm sorry about that. But none of these names ring a bell.

Q. It is quite possible, Congressman, that you did not attend. I take it that -- I take it that the --

A. Don't go into that assumption just because I don't know, because at these events it's noisy, [*17] someone can tell me, you know -- I can tell you the conversation I had

with -- you know, there were two businessmen in the event that I went to and an older gentleman at the event that I went to at the armory. And so I remember that event.

So I think I would remember the people. But I can't tell you who the names of those individuals were. I did get cards from the two men, but I don't know what I did with them. I sometimes take cards and, if I don't mark where I get them and I leave them stacked up, I end up throwing away the card because I don't write notes on it. When I write notes on it, I do fine. So at any rate.

MR. WITTEN: You've answered the question. That's what you should try to do.

BY MR. BURCHFIELD:

Q. You have, you've fully and fairly answered that question. Let me ask you, and this exercise may prove no more fruitful, but at least it's not taking a lot of time. This is the seating chart for the RNC gala in May of 2001 which I'm informed was at the D.C. Armory. Let me show you a seating chart for that. Let's mark that as Shays Cross-examination Exhibit 3.

MR. WITTEN: Let the record reflect that **[*18]** the Congressman is talking to his office and relaying information he's getting from his office.

BY MR. BURCHFIELD:

Q. We need to go back on the record at this point and just let the Congressman state what he has found from checking with his scheduler in his office. And let's start, Congressman, with the May 2002 RNC gala on May 14, 2002. You've checked with your office and what do you now believe to be the case?

A. It is my strong sense that I was scheduled to go to it. I would have been happy to go to the event, but I was also being recognized by the Sikhs. I was being recognized, I think Congressman Honda was being recognized, and McDermott was being recognized.

We had put in legislation pointing out that the Sikhs should not be discriminated against and they're basically a wonderful part of our American society. And so I went to the event a little late. I ate and then I was -- I spoke. I felt I should stay to hear the others speak.

By the time I got out of there, it just was pointless to go to the event. And I'm very comfortable in saying I did not go to the event on the 14th. And I felt badly about it because I knew that they reserved a space for me and there were **[*19]** people expecting me.

Q. Did your scheduler also check your schedule on May 22, '01, for the 2001 RNC gala?

A. I didn't ask her to, but I might remember that one. What is that one again?

Q. That was at the D.C. Armory.

A. I went to an event at the D.C. Armory. If that was the event that the President spoke at and the Vice President spoke at, they left early before the dinner was over. I went and there was an older couple and there were two younger gentlemen there who were in business together.

MR. BURCHFIELD: Let me ask the reporter to mark as Shays Cross-examination Exhibit 3 this chart.

You've got that in front of you, Congressman, it's this one. This one is a little easier to deal with because we've determined you were assigned to sit at table 125 which

is shown on page 5. And it lists the people who were also assigned to that table.

THE WITNESS: This one I can mark.

MR. WITTEN: You can mark it.

(Shays CX Exhibit No. 3 was marked for identification.)

[*20] BY MR. BURCHFIELD.

Q. Once you've had a chance to look at that, Congressman, could you just tell me if you recognize the names of any of the people there and could you confirm one way or another whether those were the people that actually sat at your table.

A. Sadly I can't. I don't recall. Usually the people they assign to me were not from my district. And I don't recall sitting with anyone who was from the district. I just -- I just remember a couple and I remember two brothers who were there.

Q. Okay. Congressman, has there ever been an instance that you can recall as you sit here today in which someone you have sat with at one of these fund-raising events, and I know Congressmen are asked to go to a lot of fund-raising events, a fund-raising event for the Republican National Committee has
subsequently come to your office or called your office and sought to meet with you on a legislative issue?

A. I don't recall. But, if they had, I would have gladly met with them.

Q. And I take it, on some testimony that you gave the last time and on the tone of that answer, that you like

many Congressmen pretty much have an **[*21]** open-door policy to meet with people who want to talk to you about important legislative issues?

A. That's correct.

Q. Okay. That's all I have about fund-raising dinners. So we're going to turn to something different now that everyone is sufficiently hungry.

Congressman, and I'm asking you for your understanding in these questions, am I correct that the Bipartisan Campaign Reform Act of 2002 allows state parties to continue raising and spending state regulated money, soft money, for activities not encompassed within the definition of federal election activity?

A. You're correct subject to state law.

Q. Okay. And am I also correct that they can use 100 percent state regulated money in elections when no federal candidate appears on the ballot?

A. I believe that they can spend state money subject to their state law for state candidates as state law allows them, correct.

* * *

[*65] A. The answer is the only thing I was really aware of was that they ran a TV ad against the governor of Texas, my candidate, George W. Bush, that made it seem like he was racist. And I found the ads extraordinarily objectionable. And we never knew who ran those ads.

And part of my interest in the campaign finance reform was to make sure, if an ad like this ran 60 days to an election, that it couldn't happen with corporate treasury

money, union dues money, and that, if these ads -- if the person who paid for this ad ran it themselves, not under the headline of the NAACP, that they would have to disclose. So, you know, there was some motivation in the legislation to get at that issue.

[EXHIBITS OMITTED]

Deposition of Carole Shields
(October 2, 2002)

* * *

[58] Q. I would just like to ask a couple questions about issue ads you were talking about earlier. Let he make sure I'm characterizing your testimony correctly. I believe you said sometimes it is important that the issue ads air on television instead of a newspaper, say, that sometimes for [59] People For the American Way to get its message out and accomplish its goal it is better for ad to air on television; is that right?

A. Mm-hmm.

Q. Is that a yes?

A. Yes. I'm sorry.

Q. Okay. Would those ads accomplish the same goals if they were paid for from People For the American Way's PAC as opposed to People For the American Way's regular fund?

A. Would they accomplish the same thing?

Q. Yes.

A. Yes.

Q. Okay. A similar question: You had said sometimes it is important to name candidates in advertisements some- times around election time; is that correct?

A. Yes.

Q. And you said that was important again for People For the American Way to get its message out and to inform citizens; is that correct?

A. Yes. [60]

Q. In your opinion would People For the American Way still be able to get its message out if those ads mentioning candidates were paid for by its PAC?

A. Yes.

MR. LEVINE: Okay. Thank you. I'll have a few more questions in a moment. We are waiting for some copies.
MR. LAWLER: I've got to tell you I'm not sure long they're going to be. It's just to authenticate the certificate.
MR. LEVINE: Yes.
MR. LAWLER: Well, let me just get that back.
THE WITNESS: Can I comment about something he just said --
MR. LAWLER: Sure.
THE WITNESS: -- because there are serious implications in what are making. I think there is an implicit assumption to what you just said, because there are limits on contributions to PACs, right? [61] If we took some larger amounts of money to run some of these ads and to build up enough money with the limit that there are for PACs, you would have to like do a mail program, which is where most of our C-4 money comes from. That would cost an incredibly prohibitive amount of money in a very quick amount of time to be able to build up that amount of money.

(Cell phone ringing.)

THE WITNESS: Excuse me for one second. I have a friend in trouble that I need to have access to.
MR. LAWLER: We're off the record while she takes the phone call.

(Discussion off the record.)

MR. LAWLER: We're back on the record. May I suggest that you read back the last sentence that Ms. Shields said.

(The reporter read the record as requested.)

THE WITNESS: If you were to move the ability to do issue work from a C-4 environment to a PAC environment, what you would essentially do is [62] when an issue comes up, like something comes before Congress, for example, that you want to let the public know is there, you would put a barrier there that would be just impossible to cross because, for

example, to use direct mail to get money and fast enough to be able to inform the public before a vote is taken, you would have to do direct mail that would cost you hundreds and hundreds of thousands of dollars upfront money to be able to do that.

People For the American Way is one of the largest liberal issue organizations out there, and we wouldn't be able to afford to do. Give me 750,000 dollars of money to spend tomorrow to bring in 2 million of dollars of money to be able to put those ads up, give me that.

And imagine if it is an organization that works on some smaller issue that has a total annual budget of $5 or something. So in order to work from an organization like you are suggesting, I mean there are realistic and pragmatic things that just make it impossible. So I don't want to let you said go by as if [63] there aren't implications.

* * *

Deposition of Senator Alan Simpson
(October 1, 2002)

* * *

[11] Q. And is it your sense that this was different either when you started in public office or at sometime earlier than that, or do you think this problem has always been with us?

A. Well, it was -- I'm a Republican, obviously. And when COPE came into the scene, my dad was active in politics. He was governor and U.S. senator. Committee On Political Action. They were big. They were a gorilla in the jungle, and they were cremating Republicans and business people.

So up came the PAC, P-A-C, Political Action Committee, and business industry, BIPAC, all the rest. How do we stop this pernicious union influence? And so they started PACs. And I thought that was a pretty good balance. And it's deteriorated to nothing, where the unions and the business community now have a word for it.

I mean, you used to give to someone who was or your philosophy. The NRA would give to people who were against gun control. I was the beneficiary of much of their largess and assistance. And Charlton Heston, who is a very close friend of mine, did a tape for me at my retirement. A magnificent man.

So here I am. The NRA, and all of them, as [12] far as I know now, huddle in their offices and say, Jesus, we might lose Dingell. So we better figure a way to give something to Rivers. Or, watch out, because they're going to have a new chairman over there in the House committee who doesn't like us at all. But we better get some scratch in there, too, or else he's going to cremate us when he or she gets in there. And there's a word for that. It's called whoring. And that's where you all are right now.

Q. I'm not sure I followed that.

A. Well, I could say it in clearer form. I don't know how. It's not giving according to your deep-held philosophy. It's giving so you can get access and kiss butt and do all the rest of the things so you won't get knocked off the perch.

Q. When you talk -- is it your view, then, that the perception of corruption that exists in our system is a perception that certain groups and individuals who give more money are going to have greater access to elected officials?

A. Number one, that is the case. Yeah, I feel that. That's my personal view, that if you give more money, you've got some guy on your staff who is going to tell your legislative assistant, when you're meeting with somebody from this industry, don't forget to tell [13] Al that these guys maxed out.

Q. And that's going to be true whether or not the person who gave the money is an individual or a group?

A. Doesn't matter. The politician -- you know, somebody does your accounting. And you have a treasurer to keep you out of the pen. And that person takes in money, checks to see if they're citizens of the United States, all the things you need to do. You don't know. You get a contribution from Kids PAC, BIPAC or PAC PAC. You don't even know what the hell it is. You say, check it out. Is it real?

And so the politician doesn't know if it's hard or soft. All he knows is that his counselors and his ad guy and all these people are saying, you need another buy. Go get some more money. And you get money from PACs.

Q. But I'd like to distinguish that appearance of corruption, which is that those who give money have greater access, from another question I'd like to ask you, which is related to what I'm going to call quid pro quo corruption. And when I say quid pro quo, what I mean, and as I'm sure you understand, is that there's some kind of an agreement or understanding between the donor and the elected official that

if money is given, that that official will vote in a way that he or she [14] would not vote were money not given. That's what I mean by quid pro quo corruption.

And with that definition, I'd like to ask, is it your view that there is corruption in our system, in that the use of soft money has given rise to a higher prevalence, a quid pro quo type corruption?

A. I couldn't even possibly answer that. All I know is that I voted independently. People didn't bother me much because they usually knew where I was coming from. I didn't have people hanging around my offices because I wasn't always listed as undecided. If you have a U behind your name in Washington D.C. as U.S. Senator, you are visited like Charles Dickins with three spirits. They come in waves to see you.

I haven't the slightest -- I never saw – that is a violation of Wyoming law. That is called bribery. And it's in our statutes, right there on the wall. So that's something -- and I was in the legislature for thirteen years. I don't know people who said -- but if they did, they've been indicted by now. The guy from Pennsylvania, Traficant, who was the big cat on the transportation system, and he's now a big consultant, he's a big butter and egg man.

I don't know people who did that. But if they did, the ones I am aware of have been found out. You [15] just don't do that. That's a criminal thing.

Q. And the purpose of my asking the question, then, is to be clear that when, either in your declaration or this deposition, you refer to the corrupting influence of all of the money in our campaign finance system now, that you are talking about the corrupting effect of buying access, disproportionate access, as opposed to creating quid pro quo type corruption, which, as you say, has always been illegal, continues to be illegal.

A. Yeah. But this kind of money where a guy like Mariani can go to the clink, and yet if he'd done it another way, is a corrupting influence.

Q. In the sense that -- so –

A. It makes people look -- like Mondale said, it looks like hell.

Q. It looks bad -- I just want to make sure I understand what you're saying. Are you saying it looks bad because someone can go to jail for doing something that is almost indistinguishable from something that is legal?

A. That's part of it. Those are not precise things. I can't slice the salami that thin. You know where I'm coming from. I've said what I've said. It's a corrupting influence. It makes people look at the [16] system and say, what are they doing now? You can give money. I can only give five bucks, so my voice is not heard. I can pick up the paper during the campaign and see this guy got five grand. I couldn't give five cents. I tried to see him or her at a town meeting, but I couldn't. And I notice old fat cat Charlie was over there talking to him. So I'm left out.

And they look at that as rotten, evil corruption. They think they're being bought off. That's what Joe six-pack thinks. That's too bad.

* * *

[22] Q. I'm now trying to focus on when those groups or other incorporated groups use their money to directly pay for a political communications broadcast on television or on the radio that refers to the name of the candidate within the two-month period right before that candidate's election and whether or not you have a strong opinion about whether those groups ought to be able to do that.

A. As long as people know who they are and what they're doing, yes, I think that's all right. Then you're into the First Amendment. And they can play around in there all the

time. But if you're going to do [23] an ad against somebody -- the 501(c)(3)s, that's what that section was about, I think. And now they've said that's a restraint on the freedom of speech. So here we go again. I believe that's what the decision just two days ago said. But that's immaterial for this.

Just say when somebody gets a group together -- and it was particularly tough on Republicans. And it was Bob Kasten, Senator Kasten of Wisconsin, who brought it up. He said, I'm getting hammered in my state by the sweetest-sounding group of groups that you could ever imagine, and they're eating me alive. And they all have names about better government forever and God looks faithfully on us and just marvelous things. And they were just highly partisan.

And so I don't know whether that's a part of this, but it certainly was part of a previous campaign finance reform.

Q. But your view is that those communications, that the harmful thing about them is when you don't know who's running them?

A. That's right.

Q. And that the solution, therefore, is to create a transparent system so you know who's paying for that?

A. Like you do with any other thing. It says, [24] this ad -- at the end of every ad, it says, this ad paid for by cowpokes for Simpson, box number so-and-so, instead of this marvelous hiding, as transparency is the key. Who is this group? Who's on their board? Who are their officers? You find the head of the Democratic National Committee on there and all these other people. My whole philosophy is to smoke them out. I don't care who does what.

That's why I go back to campaign contribution. Give a hundred thousand bucks and list your wife and what she is involved in and whether you're on the board of Procter and Gamble or whether you're getting money out of the treasury or whatever, whatever, whatever. Just smoke them out.

Forget this esoteria of doing good or backing someone. Somehow that's --

Q. Let me make sure -- I think I understand that. If you had, in an electoral district, in a state or in a congressional district, a candidate who got all of his money, 100 percent of his campaign finance money from Enron, but it was known he was the Enron candidate, that it was literally Joe Smith, brought to you by Enron, please elect to the U.S. Congress, then that is a completely transparent system. And the voters of that district are then going to decide, do they want Joe Smith, brought to them by Enron, or do they want someone [25] else who is -- who also is transparent where he got his money?

Let's say the other candidate got his money only from residents of the district, and he lists all of their names, and then the voters decide, of that district, they decide who is going to represent them in the United States Congress.

Now, that's a long hypothetical I've given you. But if that's the way the system worked, do you think there would be an appearance of corruption? I mean, do you think that is a system that is a fair system?

A. It would be better now if I answered your questions and you played with the hypothetical. I don't even know where that's going. But I can tell you that the issue for me is as simple as you can get. You're going to set a limit, fifty thousand or a hundred thousand. Obviously it's not going to be a singular candidate. There's no hypothetical like that in the world. You're going to say you can't give over fifty thousand bucks or a hundred, but you're going to need two million, so you're not going to have every singular candidate. You're going to have lots. But you ought to know exactly where they get their money and who the people are that are giving them the money. There will [26] never be a singular candidate captive of a single entity. They will be captive of entities that everyone will know of.

Q. So are you saying my hypothetical is too far-fetched to comment on?

A. For me it is, yeah. When I practiced law for eighteen years, I never let a witness answer a hypothetical question. So I don't think I'll start.

Q. I don't know whether you mean that it's a bad tactic. I am allowed to ask you that.

A. Yes, you are. And I'm allowed to not answer it.

Q. Well, you can not answer -- you have to answer. But you can say --

A. Well, I can say I don't like hypothetical questions. And I don't. So I won't answer it. That ought to clear it up.

Q. Then let me try to explore another thing, which is the difference between getting support from a for-profit entity, versus getting if from a not-for-profit entity. And let me begin by asking you this question. If you were an elected representative in the U.S. Congress or the U.S. Senate, and in trying to make up your mind how to vote on a specific initiative, specific piece of legislation, you are influenced by the [27] views of the majority of your constituents who elected you -- which is not a hypothetical question, because I assume that, in your experience as a United States Senator, that that dynamic is something you're familiar with -- would you agree or do you believe -- let me not ask it in a leading way. Do you believe that that is the way in which our democratic system of electoral politics is supposed to work?

A. Well, yeah. But they hire you for your brains. I didn't always vote the way my letters read or the polls. I never took a poll. The only poll I ever took was election year.

Q. Let me be clear. I understand the difference in -- that you may not always be governed solely by your constituents, and you're not operating strictly as a delegate. But you are a leader and may choose to buck the majority trend and convince your constituents to change their mind, rather than simply doing what they say.

But I just want to make sure I understand that it is your understanding, as a former United States Senator, that there's nothing improper about that influence, that dynamic that constituents have on their representatives.

A. That's all day long. That's the essence of [28] politics. People are attempting to influence you day and night from every source on every bill. Please vote this way. Help me do this. We hope you'll vote for this amendment. You know, if the phone rings, that's democracy.

Q. Right. That's how democracy works.

A. Yeah.

Q. Instead of it being simply your constituents, your elected -- the residents of whatever district elected you, it is a nonprofit organization that gets its money from voluntary individual members like the NRA -- some of them may be your constituents, but which is organized to promote a particular viewpoint on a particular public policy issue like gun control or abortion or taxes or what have you, and they attempt to influence you by arguing substantively over the merits of an issue, the same way constituents would, isn't that also as distinguished from a for-profit entity – which I'll ask about in a minute -- isn't that also part of the give and take of a democratic system?

MS. SEALANDER: I'm going to object to the description of NRA.

A. I should describe the AARP, then, those worthy 33 million Americans bound together by a common love of airline discounts. You're all in it to get your thing [29] done, and you do it with intensity. I was there.

Q. (BY MR. HUME) Just so you're clear, when you say you –

A. The NRA. You ain't exactly one to wallflower. I mean, you guys got hog. You can terrorize people. You're like the NEA, the National Education Association, or the AARP. You don't think that a Congressman is less terrified,

is the word, by the NRA or the AARP or the NEA? They're scared to death of them. And that's part of what I put in here.

But Dole and I would be looking for votes and say, yeah, God, we need your vote here. This is a national issue. And I'd say, I can't vote for that. Why? Because up in my state, the bastards will tear me to bits. And you say, well, yeah, but you're elected to due the national duty. Yeah, but I don't want to spend the rest of my time dealing with that group, because they're tough, they're mean, and they send letters, and they send scorecards. And come on, guys, let's get serious.

Q. In other words, these groups that you've mentioned as examples, the NRA --

A. And you.

Q. -- the NRA and AARP and other groups are powerful and influence the way legislators act because [30] they influence what constituents think?

A. They can go back and fan the flames. They can go back and drive you insane.

Let me tell you one that your group did, so you get the message. You'll like this. Dole and I and some others put together a little piece of legislation -- I think it was two and a half million bucks. You can find it somewhere -- for the inner city of Los Angeles to use -- to advertise that if you brought in your gun, if the Crips and the Blues and the Reds or whatever brought in their gun, they would give you two tickets to a Lakers game and some other things and five hundred bucks or three hundred bucks. And that was the purpose of the money, to try to get guns out of the hands of gangs. Sounded like a damn good thing to me.

And Dole and I and the rest of us got savaged by the NRA and others on the basis that this was a slippery slope. This was a slippery slope to doom. They're out there buying your gun, your precious gun. And God knows, when you're a guy that's been on federal probation for shooting mailboxes

and shot expert with damn near every weapon in the Army, I love guns. I can shoot them. I love it. I hunt.

But for God's sake, when you have that kind of [31] stringency and stridency and then pick on the people who are for you and fight your good fights, it's about purity. And let me tell you, the AARP is about purity. You, by God, help the old farts or you're out in the cold. And they'll send the troops. The scorecard will go back to your district. The scorecard on the NRA will go back to your district. Or AIPAC. AIPAC. We're not a PAC. That's the American Israel Political Action Committee. Power, pure power. And then the scorecard goes back.

And so you have guys who are chilled. And just because they're nonprofit, they're not chilled? Forget it. Forget it.

Q. What is a scorecard, when you refer to --

A. It says, on house bill so-and-so, this jerk voted this way. And here's how our association would have voted. And those go out day and night through your whole tour of duty.

* * *

[39] Q. I can. And I'm interested in the anecdote about the letters, the exchange you had with your constituents over this -- when the NRA sent its scorecard, they wrote these letters, and you responded. Was there ever a candidate who opposed you in any [40] election who made an issue out of this Los Angeles initiative?

A. I don't remember that specifically, because usually I was opposed -- I wasn't opposed in a primary after the first time I ran. And anyone who was a Democrat who ran against me who wasn't totally -- Democrats aren't as thorough on their issue of feeling about gun control sometimes as Republicans. So it never came up in that setting.

Q. What I'm just trying to explore is whether you have any gauge, any way to gauge whether the dialogue,

essentially, you had with your constituents over this issue, whether you were able to succeed in explaining to them that you don't have to be an absolutist, you don't have to be an extremist, that you are in favor of gun rights, the Second Amendment, that you're in favor of the core agenda, let's say, of the NRA, but that doesn't mean that you can't see a good program in terms of having gang members in LA trading guns to solve the problem of gang violence in an inner city. Do you have any way of gauging whether you were effective in that dialogue?

A. I was always effective in the dialogue, because I drafted my own letters. I had a thing called the Correspondence Management System. There are [41] probably eight hundred paragraphs in it. And all eight hundred paragraphs, I had drafted. So when a guy wrote about gun control, I'd just say, hit lever Number 842. All mine, all my language. I crafted it. And I go through, and it would be long, two or three pages, and always irritated people.

Look, I wrote to you because I was bitching, and I get back an eight-page letter. I said, yeah, you did. And you asked about my response, and I've given it to you. And I'd often hear back, saying, I don't agree with you at all, but I wanted to know if your brain was engaged and thank you for this.

And I sure as hell did explain what Dole and I were trying to do that some jerk on a talk show had distorted. Today we find out that Al Simpson and Bob Dole have gone from their -- and that happens all day. All these damn talk show people, all they do is get people overwrought and their bowels twisted in a knot. They don't solve anything.

Q. And I hear you completely. But just to be clear, that, I can imagine, enormously annoying and frustrating reality of political life does not – and I'm asking this as a question, and I take it -- I'm asking it in a leading way, I'm afraid. Am I right in saying that despite that annoying reality,

you don't [42] think that, for example, the NRA shouldn't be able to go on a talk show and say what it says, but it's just part of reality?

A. That's an absurd question, because I have never spoken about limiting anyone's First Amendment right to do anything. I just think that now you reach for the First Amendment, pull it out of the air, and if you can fit it to Buckley, you can fit it to anything, grass roots versus AstroTurf, you know, the old game back down, you know, how do we keep the grass roots and not the AstroTurf? And there's plenty of AstroTurf that flies around Washington, D.C. and comes out of groups like this. Veteran's groups, good God, try them.

Oh, don't get me started on that. We're about to have lunch, for God's sake.

Q. But let's just take it from that appearance on a talk show, something that is clearly an exercise of their First Amendment right, something that you don't oppose, to something that I also gather from your earlier testimony that you don't oppose but I want to explore, which is the running of issue advertisements, advertisements that satisfy the definition of what BCRA calls an electioneering communication, close to the election, mentioning a candidate.

MS. SEALANDER: Objection, targeted to [43] relevant constituency.

Q. (BY MR. HUME) But I think you understand. So, those types of advertisements. First of all, when the NRA pays for -- let me back up and first ask you, when an issue advocacy group like the NRA wants to convince people to agree with it on a public policy initiative, do you agree that public broadcasting over television is one effective way of trying to do so?

A. Well, they all do that, of course.

* * *

[50] A. Anyway, not the last time. You were talking about the NRA this, the NRA that, as if they were being denied the opportunity to respond. They're not being denied the opportunity to respond if they use a PAC. Isn't that correct? Is that right?

Q. So they are allowed to use a PAC. And it's your view that because the PAC is allowed, that that makes it not unfair. In other words, the individual can use their money, and the NRA or other groups can use their PAC money.

A. Well, first we're talking about media people and media groups.

Q. We've moved on from media.

A. Well, I'd like to move back. Because if the media gets to whack on you with an opinion and the NRA, quote, can't respond but the NRA PAC can respond, I think that's perfectly fair.

Q. Let me ask this question, then. When the NRA runs an advertisement, a political broadcasting communication, and when the NRA PAC runs it, do you think that the American public perceives a difference between the two broadcast communications?

A. Well, not only that, but I don't perceive any difference between a, quote, NRA pronouncement and an NRA PAC announcement. That really is dancing on the [51] head of a pin.

Q. And to the extent that there is any appearance of corruption associated with such an advertisement or broadcast communication, would you agree that there is no difference between that appearance of corruption whether the ad is paid for by the NRA or whether it is paid for by the NRA's PAC?

A. I've never picked a certain piece out of this puzzle and called it corruption on that instance. I'm talking, it has a -- the whole thing has a corruptive influence on Americans and on the political system, the whole issue.

So the one ad where you're coming up with, to name it as -- looking at it and say, boy, this is corrupting, the NRA ad, I'm not even going to address that. I'm saying the whole scheme of things here is corruptive. It doesn't look right. It looks like hell. People think it looks like hell. It doesn't work. It works, but it is not -- I'm not going to pick that one right there out of the air and say this is corruptive.

And you've got the NRA and the NRA PAC. You know, finally this old cowboy can wake up to that. There's no difference to the American public of who that is. None.

Q. When you say you don't want to pick out this [52] one piece of the system, namely the piece of issue advertising -- I'm afraid that is what I'm, as you know, have been asking you about and want to ask you about. And so when you say you don't want to pick it out, do you mean you don't have an opinion on whether or not issue advertising that's close to an election generates any kind of an appearance of corruption?

A. You haven't asked me that one before. You've talked about –

Q. I'm asking now.

A. I'm saying the whole scheme of things in campaign finance has the appearance of giving government and the electoral system a corruptive look. If you want to get down into all of it -- I mean, I don't know what ad you're talking about, if you're talking about an NRA ad or an NRA PAC ad. So let me slice it again.

I don't think the American people or me make any distinction whether the NRA is doing it or the NRA PAC. And if a radio station or a television outlet has an opportunity to hammer your shorts with an opinion, you ought to respond. And if the PAC can't respond, I think that's a phony restriction.

And now go back to, say, the rich guy, who you've asked about, has run an ad and you can't respond. That's phony. But if you're going to respond, then [53] respond with the money, which is the PAC. Don't try to say, we're not

responding through our PAC because that's about money. We're responding from the goodness of our hearts of the NRA, the beleaguered members of our affiliation. I don't buy that one.

* * *

DEPOSITION OF SENATOR OLYMPIA J. SNOWE

Q. But you don't think that a similar problem is created when the unregulated undisclosed money in the corporate and union treasuries is expended on precisely the same kind of voter mobilization efforts that the state parties --

A. I don't have any specifics to tell you one way or the other on the amounts of money that are expended by corporations to get out the vote. I'm just not aware that corporations engage in that activity as much as labor unions engage in that activity.

Q. Let's focus on unions.

A. Getting out the vote is a grassroots activity. That's working within their own memberships. Frankly, that is a far different activity, I think, than talking about sponsoring advertisements over the airwaves, communicating to the maximum number of people possible about a **[*160]** particular view or a particular candidate without acknowledging it's a political campaign ad. That's much more insidious, you know.

Q. Unions do engage in that kind of get out the vote grassroots activity?

A. Yes.

Q. And is it your understanding of current law that they can only do that in communications with people who were members of the union?

MS. BREGMAN: Objection; asked and answered.

THE WITNESS: I really can't say.

Snowe Dep. 159-160

MS. BREGMAN: If you have a view on your interpretation of current law, but if you do not know that for sure --

THE WITNESS: I don't know if they are limited to their own membership in getting out the vote. I don't know that.

* * *

[*205] Q. I wanted to clarify that for the record.

A. I appreciate that. Thank you.

Q. I think I will switch to see if at least we can agree, and I will preface a little of this to avoid any potential confusion. When I'm asking you questions about your interaction with either the state or national political party committees, I'm obviously doing that in terms of yourexperiences or observations. I believe you participated in that process.

Are you aware of the Republican Party at either the state or national level lobbying you or other Members of Congress on pending legislation?

MS. BREGMAN: Objection; speech or debate.

You can answer that.

THE WITNESS: I don't know that I can cite **[*206]** any specific instances. I know it hasn't been true of the state party. The state generally has not approached me on any issues. I belive there have been times in which the Republican Party chairman might have indicated a preference on an issue at a policy lunch or something in the past on some issue, but I really can't recall any specific instances.

BY MR. CARVIN:

Q. And the last part of your answer was the Republican chairman meaning --

A. The national chairman. Sometimes the national party chairman since I have been in the Senate has frequently attended the policy lunches. So it may well be that they might have indicated somewhere along the line in the eight years I have been in the Senate talks about a preference. But I don't remember any specific instances.

Q. Are you aware of any instances where the national party committees -- and I would include in that the RNC, the Congressional committee and the Senatorial committee -- have implied or stated that they would provide or withhold soft money to induce **[*207]** a federal officeholder or candidate to support the party committee's policies? MS. BREGMAN: Objection; speech or debate.

You can answer it.

THE WITNESS: No, I don't have any indication that's happened.

BY MR. CARVIN:

Q. Have you looked at how the National Republican Senatorial Committee makes decisions on which races to fund or not to fund?

A. I have no idea how they make that decision. So that's a good question. I have no idea.

Q. I think I know the answer to this. In light of that, do you have any reason to believe that their expenditure decisions are in any way affected by the identity of the soft

money donors or candidates who have raised a lot of soft money?

A. No. I don't know that to be true.

Q. And I may be really belt and suspenders here. I take it that is also true of the Democratic national committees?

[*208] A. I would assume so. I don't know.

Q. Does the Senatorial committee, as far as you know since you have been in the Senate, have a policy where Senators will contribute their personal excess campaign funds to the Senatorial committee?

A. Do they have a policy?

Q. Have they ever had a policy since you have been in the Senate?

A. They have asked us to contribute -- you mean left-over funds?

Q. Right.

A. That's correct.

Q. How about solicitation, requesting that Senators help them in fundraising for the Senatorial committee?

A. Yes.

* * *

[*231] Q. You don't have a leadership PAC?

A. No, I don't.

Snowe Dep. 207-208, 231

Q. And is it the chairman of the Senatorial committee? Is that what they call the ranking Senator?

A. Yes.

Q. Has the chairman of the Senatorial committee ever mentioned to you soft money donations in a context which even implies that he or she thinks it should influence a legislative activity by you?

A. No.

Q. I think you have answered this. To the extent you are aware of soft money donations, it has had no effect on your performance as a legislator in either the Senate or the House?

A. That's correct.

Q. Senator, do you recall Senator McConnell **[*232]** at any time suggesting that the expenditure decisions of the Senatorial committee would be affected by the amount which Senators raise soft money for the Senatorial committee?

A. No.

Q. Let me ask you a general question while we are looking at that. In your experience, are you aware of the Republican National Committee either soliciting or transferring money to state or local candidates?

A. Did you say soliciting?

Q. Yes. I can break it down for you if it would be clearer. Sending out a fundraiser letter for somebody who is running for governor of some state. Do you have any familiarity with that?

Snowe Dep. 231-232

A. No. It is possible. I just don't recollect anythi .g. But it may well be possible. I could have been at some point in time. So much comes across my desk. It is possible. I don't recall. I don't want to say absolutely not and find out that something did get my attention. But I don't recall.

Deposition of Raymond D. Strother
(October 24, 2002)

* * *

[18] Q. Whether we're talking about genuine issue ads, sham issue ads, or express advocacy ads, would you agree that all political advertisements are in some general way designed to influence the political opinions of the audience? [19]

A. It's to educate them. I think there are some campaigns that are not political, some issue campaigns that are not political.

Q. Fair enough, but there are advertisements that are either attempting to influence political opinions or public policy opinions or opinions about a public issue of some kind?

A. There are also those, yes.

Q. Would you agree also there is nothing inherently corrupt or undemocratic about engaging in that sort of public broadcasting in an effort to impact public opinion about a political issue?

A. You're talking about after the First Amendment?

Q. In other words, in your opinion, there is nothing in any way corrupt or undemocratic about the enterprise that your business is involved in of airing these political broadcasts?

A. I don't think so, no. [20]

Q. Do you believe not only is it not corrupt or undemocratic, as you say, you're an advocate of the First Amendment, that it actually makes a positive contribution to political debate generally?

A. It's a two-edged sword. It can make a positive contribution. It can be destructive, I think.

Q. Depending upon what?

A. There are thousands of factors. We can write a book about it. Let's talk about negative advertising. Negative advertising is a two-edged sword. It cuts both ways. In other words, can it be a positive force of communication, yes, but at the same time, it's a negative force. In other words, you can't escape the consequences of your actions when you communicate. There are both positive and negative actions, always. It isn't necessarily always constructive, is what I'm telling you.

* * *

[39] Q. Do you have any experience of any [40] candidate who has ever changed his vote specifically in response to someone who has given a lot of money to his campaign?

A. If I did, I wouldn't say so. I would keep that confidential. However, one thing I try to do is stay out of government. I don't go to Capitol Hill. I rarely have to because you can't do political business there anyway. I don't give advice on how to vote. I never have. It's a principle of mine. I don't do that.

* * *

[139] Q. As I understood your earlier testimony, you believe media consultants generally do not have both candidates and issue groups as clients. Is that right?

A. Generally. [140]

Q. Generally, they do not have both?

A. Right.

Q. In other words, your firm specializes in representing candidates. Isn't that right?

A. Correct.

Q. And other firms specialize in representing issue groups. Isn't that right?

A. Correct.

Q. Generally, they do not have both candidates and issue groups as clients?

A. Correct.

Q. I would like to move onto to your antidote about the F and the C grade from the NRA. This is in paragraph 14 of your declaration.

A. Correct.

Q. This is a specific antidote. Is that right?

A. It is.

Q. Can you tell me who it was that was the candidate?

A. No. [141]

Q. What is the reason --

A. Client confidence.

Q. I'm not sure I understand. How is --

A. It would be divulging a confidence of a client. If I sat in on a confidential meeting, I wouldn't talk about it.

Q. Was this a client of yours? This candidate was a client of yours?

A. Yes. A client of my firm's.

Q. Did the candidate tell you directly yourself, personally, about this episode with the Sarah Brady group and the NRA?

A. Yes.

Q. Do you recall specifically when she told you? It was a woman. Right? Was the candidate a woman?

A. (Pause.)

Q. Do you recall specifically when the candidate told you that? I really thought it was a woman for some reason, maybe because Sarah Brady's name is in the paragraph.

A. Okay. No, I don't recall. It was [142] this cycle.

Q. Do you recall who else was with you when he or she told you?

A. Yes.

Q. Who else was that?

A. I will not divulge that. It was a conference call.
MR. HUME: For the record, the NRA would like to object to your not being willing to divulge that.
THE WITNESS: I don't blame them.
MR. HUME: And for your not willing to divulge the earlier recollections you had of individuals or groups that may have been involved in the two-camera shoot antidote or example that you gave, and would reserve the right to move to strike your testimony, based upon your unwillingness to tell us that.
THE WITNESS: I understand.
MR. KESSELMAN: I just want to put something on the record in response to that objection. I think that Mr. Strother has given [143] a lot of specific examples where possible, where it wouldn't require him to divulge client confidences, and has been incredibly forthcoming in his testimony today. While he isn't willing to give the particular names of people involved in the incident in paragraph 14, an examination of the entire transcript would be littered with specific examples that talk about all the points illustrated in the declaration. You can go ahead and continue with the questioning.
MR. HUME: We'll reserve our right to get into the legal argument later.
BY MR. HUME:
Q. But, just to be very clear, I take it you did not refuse to disclose to me just now, the nature of the identity of this person to save us the time of uttering the name of that person or to save space on this document?
A. No. I refused.
Q. Based on your refusal to disclose a confidence -- what you perceive to be a [144] confidence?
A. That's right.
Q. Do you have personal, specific knowledge of how the NRA grading system works?
A. No.
Q. Do you know whether the NRA runs ads only on candidates who get an F grade?

A. Do not.
Q. Are you willing to disclose where this race took place, this candidates race took place?
A. No.
Q. Are you willing to disclose whether it was a state that is generally thought of pro gun or anti-gun?
A. I tend to represent conservative Democrats, and most places I work are pro gun.
Q. It would have had, I take it, a negative impact on this candidate's prospects for success in the election if the NRA had come out and said that she or he had accepted money from the Sarah Brady anti-gun group? [145]
A. Correct.
Q. The reason it would have had a negative impact on his or her prospects for success is that the voters in that state would not want to elect someone who is closely aligned with Sarah Brady's group. Is that right?
A. That's true.
Q. If that's true, let me ask you, isn't it simple a question of democracy? In other words, isn't the issue with this candidate simply whose side are you on? Do you want to be aligned with Sarah Brady? Do you want to be aligned with the NRA or do you want to be in the middle, and the voters have a right to know in this particular instance?
A. I'm not sure I can answer that.
Q. Do you know how the candidate made the decision between choosing to accept the check or not to accept the check?
A. It was a political decision. That's all I can tell you. It was a political [146] decision.
Q. When you say, "a political decision," you mean based upon what --
A. Based upon how the voter would react if it was disclosed where the check came from. Let me say this about checks so that we're clear about that. Mrs. Brady didn't come and hand a check to this person. Over the threshold you get

checks. Checks come in from various group who want the ear or the friendship with the candidate later. This happens with river boat gambling companies, with all sorts of groups. You have to be very careful, when you go through these checks, which ones you accept and which ones would have a negative impact on your campaign. So, if you came across a Brady check and 40 other checks or 30 other checks from some fund-raiser somewhere, you would have to make a political decision, and you would probably say, "It would not benefit me to take this $500 and lose $100,000 worth of support on [147] the other side, which would be how much it would cost me to correct the problem I would create by taking the check." So it's a political decision.

Q. First, I would like to reserve the right to strike the part of your answer that described the phenomenon of checks other than the specific response to the question about how you believe this candidate made his or her decision. I'll now ask you, do you have any basis for believing that this candidate made their decision based upon a fear of not being able to raise money?

A. Yes.

Q. I thought it was your earlier testimony that the decision was made based upon the expected reaction of the voters once the NRA publicized the fact that he or she had accepted money from Sarah Brady's group?

MR. KESSELMAN: Objection, mischaracterization.[148]

THE WITNESS: You haven't contradicted yourself. Raising money is politics. It's all one in the same.

BY MR. HUME:

Q. You're saying it's part of a seamless hole?

A. Yes.

* * *

[223] Q. I also understand your testimony to be that you don't think there's any distinction the public understands between hard and soft [224] money. Is that right?

A. That's correct.

Q. Just to be clear, it's your view that you support BCRA because -- your support is for legislation that keeps special interests groups out of the election process, defined as within 60 days, regardless of whether they're using hard or soft money?

A. That's correct.

* * *

CROSS-EXAMINATION OF RAYMOND D. STROTHER

A. It was the start of what I call the insidious spread of this kind of advertising because they could come in and the candidate, the Republican -- they always were for Republicans. The Republican would say, "I don't know anything about them. I didn't ask them in. I don't know anything about their campaign. Therefore, it's not any of my business," and he was able to get away with that. That was the first of it I had ever seen was in '82 or maybe '80. '82, I think. That's a roundabout way to answer your question, but my beliefs are philosophic and not really specific when it comes to the law.

Q. In your example of the candidate with the $1,000 versus the candidate with $1,000 plus an extra million that he gets, you say that's where corruption comes into the system. I believe that's what you stated. Is that [*39] right?

A. That's right. That's my opinion.

Q. I understand. Is it your opinion that that is corrupting because it's simply unequal?

A. No. It's corrupting because it gives the $1 million person undue influence. I came out of a working class family. Let's say, my father wanted to see a congressman. He's dead, but, let's say, he wanted to see a congressman, and he went to Washington to see the congressman, but somebody was in the office at the same time who had helped engineer $1 million to the Democratic party. Who's going to get in first to see the candidate? I can tell you. There is never a question about that. It isn't a democratic process. The person with the most money has the most influence. Corrosion isn't what it does just to the campaign, but what it does to the legislative process. Like John Breaux said, "Renting votes."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[Caption Omitted In Printing]
Washington, D.C.
Thursday, September 19, 2002
Deposition of BENNIE G. THOMPSON

* * *

[68] surveys show the voters perceive that money has an undue influence on our democratic process and that ordinary citizen voices are shut out of the process. What impact will increasing these contribution limits have on those public perceptions?

A. I think it will expand the public perception that by doubling the hard money contribution, money is the predominant factor in who gets elected and many times it's such a small segment of the population that has the ability to contribute at this proposed doubling level that democracy would in fact be damaged by that.

Q. What about the impact of increasing contributions on public policy, what will that impact be in your view?

A. Well, in my view many members of Congress react to those individuals who were able to contribute to their election or reelection and if now you had the ability to double many of those opportunities it could narrow the ability of the public to influence public policy and put it in the hands of a precious few who have means.

Q. And when you say many members react to those who contribute, are you referring to those who contribute at the maximum level or near that?

* * *

[87] Q. And why not?

A. Because it sets up barriers to participation by communities of low and moderate income individuals, minority communities and that's what this country should not be. This country should be involved with all its citizens, its citizens should have the ability to participate in the electoral process without being priced out of the market and in my opinion, by doubling the hard money contribution, you price low and moderate income communities out of the market for electoral participation.

MR. BONIFAZ: Thank you, Congressman, for your time. I have no further questions.

MR. HENRY: I just have a couple of follow up.

MR. MILES: I have two.

EXAMINATION BY COUNSEL
FOR PAUL PLAINTIFFS -

BY MR. MILES:

Q. Do you believe that there should be a law limiting the amount an individual can spend on his own race?

A. Yes.

Q. Thank you.

* * *

CROSS-EXAMINATION OF PAT WILLIAMS

Q. And do you understand the different rules that apply to the raising and expenditure of hard money as opposed to soft money?

A. Not a clear understanding of that, no.

Q. Okay. You understand that hard money is money that is raised subject to the regulation of the Federal Election Campaign Finance Act?

A. Yes.

Q. And that soft money is essentially all other money?

A. Yes.

Q. Okay. Do you oppose the presence of soft money in politics?

A. Basically, yes.

Q. Why?

A. Because so much of it is used for what I see as denigrative, negative ads, which lead to **[*22]** American's distrust in candidates and the system generally.

Q. There's a lot wrapped up in that answer.

A. It was a big question.

Q. Yes, it was. I want to break it down, I guess, into two separate parts. You have one problem with the way the money is expended, that you saw on issue advertising?

A. Yes.

Q. And could you explain that a little bit more?

A. Campaigns -- or, rather, advertisements, particularly on television, which have been used to lead the voter, or potential voter, to a negative view about a given candidate have served to denigrate the public's trust in the system and in candidates.

It has become so egregious that Americans, literally by the millions, are dropping out of politics, refusing to vote, to contribute, to attend forums, and, I think, are embarrassed by the system.

Q. Would you have less of a problem with soft money than if the issue advertisements that were purchased with soft money were all positive in tone, as opposed to negative?

A. I would have less of an issue with it.

* * *

[*56] Q. So a situation could arise very similar to the one in 1993, in which special interest groups could come together and, so long as it was not immediately before an election, air the same kind of advertisements --

MR. LEVINE: Objection.

(By Mr. Stowe) -- as those in 1993?

MR. LEVINE: Objection; calls for speculation.

A. Well, I don't know what -- I don't know what's going to happen. But if the way you present it, in fact, becomes the reality, then I believe campaign finance reform would not have been complete enough, and that groups such

as we are speculating about also be barred from running negative ads.

Q. You would support, then, a bar on special interest groups airing those kinds of negative ads outside the 60-day window?

A. Yes.

Q. And you don't have any reason to think that special interest groups, and the kind of soft-money **[*57]** expenditures that they make, are any less corrupting than soft-money expenditures by political parties, do you?

A. Any less corrupting?

Q. Correct.

A. Are they any less corrupting? No, I don't know that they're any less corrupting. They may be more corrupting.

Q. Okay. Can you think of some specific instances where issue advertising by special interest groups had negative effects on the political system, from when you were serving as a congressman?

A. Yeah. The Harry and Louise ads -- just to stay on the healthcare for a moment. I think the Harry and Louise ads painted a completely false picture of what former President Clinton and some of us were trying to achieve in the way that healthcare is paid for in the United States.

I can think of ads in Montana -- both print, radio, and television -- which have been run against Montana candidates by front groups for the extractive industries in Montana -- oil, gas, timber, mining -- which have painted what, in my view, is a false picture of candidates and, I think,

have confused the voter, unnecessarily denigrated given [*58] candidates, individual candidates. And worse, have taken both time and money that should have and could have been spent talking about the issues that are, it seems to me, wholely important.

Let me give you an example -- two examples. We have a country headed, once again, for significant debt, probably headed for war, in which Americans and many others are going to lose their lives. We have a stock market that's lost eight-trillion, seven-hundred thousand dollars in funds; a huge portion of it pension funds, likely never to be recovered by people whose lifetime savings is lost.

And in Michigan, people want to argue about whether or not Paul Wellstone is a communist. And in Montana, they want to argue about whether Mike Taylor is gay.

With all of those issues, money is being spent on negative ads for things that make no difference to America's enormous problems, and the State of Montana's enormous problems right now.

So money is being used to divert attention from those things that the American people and Montanans want to and should focus on, and expect their parties and their elected officials to focus on. And we don't do it because we found out it's [*59] more effective to get elected by running negative ads, than talking about the real issues that confront us.

Q. Do you think that negative advertising by special interest groups is going to get worse, stay the same, or get better if parties are prohibited from using soft money to pay for issue ads?

A. Well, people have a way of finding loopholes. And so I don't truthfully know the answer to that question,

because I have great -- I have great belief in the fact that a lot of savvy people are hired to find ways to escape through various loopholes in the law.

I do think that campaign finance reform that is now under question in the courts, however, is a significant, major step over the threshold towards the eventual closing of those loopholes and reforming the system.

Q. You've stated that you refused to raise or accept money from healthcare-related industries back in your 1994 reelection campaign. Again, you're speak of hard money there?

A. Hard and soft.

[1(1 PCS/ER 00001)]

AN ANALYSIS OF THE 1998 AND 2000 BUYING TIME REPORTS

Dr. James L. Gibson

September 30, 2002

INTRODUCTION

I was retained by counsel for the AFL-CIO, the National Association of Broadcasters, and Senator Mitch McConnell to examine two reports produced by the Brennan Center on the subject of "issue advocacy" or political communication. These reports, and their abbreviated titles, are:

Buying Time 1998:

Krasno, Jonathan S., and Daniel E. Seltz. 2000. *Buying Time: Television Advertising in the 1998 Congressional Elections.* New York: Brennan Center for Justice.

Buying Time 2000:

Holman, Craig B., and Luke P. McLoughlin. 2001. *Buying Time 2000: Television Advertising in the 2000 Federal Elections.* New York: Brennan Center for Justice.

In addition, I have reviewed the depositions of three of the authors of these reports (Seltz, Holman, and McLoughlin). Finally, I directly examined and analyzed the raw data upon which these two reports were based. The analytical and statistical methods and techniques I have used in preparing this report are those customarily employed in quantitative analyses of social scientific data.[1] [2(1 PCS/ER 00002)]

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1 A complete listing of the materials upon which I relied in preparing this report is attached as Exhibit 1.

QUALIFICATIONS

Evaluating these data and reports is entirely within my expertise and competence, as documented in my vita.[2] A few highlights are worth considering:

- I have taught statistics and data analysis for nearly thirty years, including regularly teaching a three-semester sequence on advanced statistics and data analysis for graduate students in political science and other social sciences.
- I have published widely in the leading political science journals, worldwide. I regularly contribute to what are considered to be the three most prestigious journals in our discipline: the *American Political Science Review,* the *Journal of Politics,* and the *American Journal of Political Science.*
- My research has been supported by millions of dollars of grants from the National Science Foundation.

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2 A copy of my curriculum vitae is attached as Exhibit 2 to this report. In my vita, I list all of my articles and books published in the last 10 years.

I also note that, in the last four years, I have been deposed or testified at trial only a single time. My deposition was taken in *Warren vs. St. Louis Police Officers Association,* on February 22, 2002. My role may only have been that of fact witness, rather than an expert witness, but I note this deposition nonetheless.

My consulting fee on this case is $250 per hour (plus expenses). To date, I have worked approximately 194.25 hours, for a total fee of $48,562.50.

- My published research has won several awards, including an award in August, 2002, for the best paper presented at the Annual Meeting of the American Political Science Association.
- I serve as a peer reviewer for many different publications and agencies, including approximately two dozen academic journals, several publishing houses, [3(1 PCS/ER 00003)]and public and private research foundations ranging from the National Science Foundation and the Australian Research Council to the Russell Sage Foundation. I have also served as Associate Editor of the journal *Law and Society Review*.

Thus, I have had vast experience with data collection and analysis in projects precisely comparable to that reported in the Buying Time reports.

Because the 1998 and 2000 reports differ in many important respects, I report the results of my analyses separately.

BUYING TIME 1998

Summary of Conclusions about *Buying Time 1998*

- *Buying Time 1998* should not be accepted as the product of scientific inquiry, but is instead policy advocacy written by people with a strong ideological commitment to a particular position on campaign finance reform.[3] [4(1 PCS/ER 00004)]

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3 Nowhere are the intentions and motives of the investigators better documented than in the research proposal "Issue Advocacy: Amassing the Case for Reform." See Holman Deposition, Exhibit #3 (copy attached as Exhibit 3). In that proposal, conclusions about the extent of illicit issue advocacy and the dangers it poses are clearly asserted, prior to any data collection or analysis. Furthermore, the authors clearly state their policy objectives: "the purpose of our acquiring the data set is not simply to advance knowledge for its own sake, but to fuel a continuous and multi-faceted campaign to propel reform forward" (p. 2). Further: "The questions we expect to answer are not part of some abstract inquiry. Rather, they are linked directly to a strategy for promoting reform" (p. 3). One of the authors of the 1998 Report notes that one of the goals of the study was explicitly to provide empirical data that would help the campaign finance reform effort. See Seltz Deposition, p. 23, lines 4-5. (Referenced excerpts from the Seltz Deposition are included as Exhibit 4.) Further, he acknowledges that "we were constantly consulting with attorneys at the Brennan Center" (p. 68, lines 12-13) in making decisions about the data base. The strong policy and ideological commitments of the investigators are not compatible with the conventional canons of scientific objectivity and may have undermined the integrity of the data collection and analysis.

- In general, the conclusions drawn in *Buying Time 1998* should not be accepted because the data upon which the report is based are fundamentally flawed.
- Indeed, to the extent that any reliable inferences can be drawn from the data, the conclusion would be that a very large percentage of the advertisements whose purpose was coded as seeking to influence an election in fact had policy issues as their primary focus.

General Comments About the Report and the Investigators

At the outset, several characteristics *of Buying Time 1998* should be noted:

- This Report is not the product of any peer-review process. The Report was published by the Brennan Center, not by a commercial or academic press. Thus, the Report was not vetted in any way whatsoever prior to its publication, and consequently the normal process of explication of the project methodology, error correction, and review of substantive conclusions prior to publication did not take place. This seriously limits the confidence one can place in the Report.
- The Report largely consists of a series of tables filled with quantitative information. The tables are rarely explained, analyzed, or interpreted. For instance, Chapter 4 consists of one page of text (p. 87), then 21 pages of tables (pp. 88-108), a half page of text (p. 109), and another page with tables (p. 110). Such a chapter cannot be taken as serious scholarship. Serious scholarship would carefully explain the objectives of each of the analyses, the details of how the data [5(1 PCS/ER 00005)] were manipulated, and would carefully and clearly link any substantive conclusions with specific empirical evidence. None of this takes place in this chapter, or in this report more generally. This report was surely published "inhouse," by the Brennan Center itself, because, based on my experience as a reviewer for publishing houses (and the sort

of review I would submit were I called upon for publication advice), I doubt whether any academic publisher would publish a document like this.

- No data base has been (nor can be, it appears) produced that will generate the specific numbers found in this Report. This is in part because the data set is continuously being manipulated and changed. But it is also a function of the lack of transparency in the statistical analysis that underlies these tables. I will give specific illustrations of this throughout my report, but most tables do not provide sufficient information for an analyst to replicate the findings. In the social sciences, we demand that statistical analysis be replicable (that another investigator using the same data be able to reproduce exactly the same findings). This report is not replicable, and that undermines tremendously any confidence one should place in the findings produced.
- The Report is filled with questionable statistical techniques and applications.
- Finally, I must note that the authors of the Report apparently were not involved in collecting either the data about the airings (from CMAG) or the data describing the ads (from Professor Goldstein). As with any secondary analysis of [6(1 PCS/ER 00006)] data collected by others, this most likely limits the authors' understanding of the nuances and peculiarities of the data base. This is particularly so since this is a demanding data base involving large numbers of cases, multiple units of analysis, various data infirmities (e.g., missing data),

and variables based on highly subjective judgments made by undergraduate students.[4] Moreover, I note that one of the authors (Mr. Seltz) seems to have little if any training in statistical analysis, apparently learning whatever skills of data analysis he possesses on-the-job, in the course of preparing this report. Given that this data base is large, complicated, and difficult to analyze, it is extremely worrisome that the results are so heavily dependent upon the limited skills of an author who is a novice analyst.

The Sources of the Data for *Buying Time 1998*

The data for *Buying Time 1998* are drawn from two sources. First, information about the broadcasting of these advertisements was collected by Campaign Media Analysis Group (CMAG). Second, information about the content of the ads was coded by undergraduate students at Arizona State University under the direction of Professor Ken Goldstein. Both of these data sources require considerable scrutiny.

The first source of data analyzed by the authors *of Buying Time 1998* is the information [7(1 PCS/ER 00007)] about ad broadcasts. These data were purchased from CMAG, which relies upon a technology that purports to recognize "each separate commercial run, sending the storyboard (full audio and every four seconds of video) of every commercial to CMAG headquarters" *(Buying Time*

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4 Professors Krasno and Goldstein acknowledge that the coding of some of the variables in the data set - explicitly including the so-called purpose of the ad - was a subjective enterprise. *See* Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics 35* (#2, June): 207-212, at page 207 and at page 209. A copy of this report is attached as Exhibit 5.

1998, 7). There are of course many limitations to the CMAG data, including:

- CMAG does not monitor all broadcasts; instead, its coverage is limited to only 75 media markets (out of 210 such markets in the country).[5] Given this limitation, one must be particularly careful about generalizing the findings of this study to all political communications.
- Media markets are not coterminous with electoral districts (e.g., the New York City media market), meaning that ads broadcast throughout a media market are reaching citizens with different relationships to politicians, candidates, and elections.
- The CMAG technology was not able to distinguish ads differing in only a few words, treating, for instance, "cookie cutter" ads mentioning Senator Kennedy as identical to ads mentioning Senator Boxer. Since ads apparently cannot be uniquely identified by the technology, the information in the data base about when any given specific ad was aired most likely contains errors.
- Complete visuals are not provided, meaning that some information depicted in the ad may be excluded and not captured, thus compromising the [8(1 PCS/ER 00008)]

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5 Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold *Bill." PS: Political Science and Politics* 35 (#2, June): 207-212, at page 207. See Exhibit 5.

coders' ability to analyze the complete content of the ads.

- The technology is of course dependent upon the nature of the ads themselves. If ads display information in a way that is illegible, then the CMAG images will themselves be illegible.
- Not all methods of political advertising and communication are captured in the CMAG data, as for instance communication via radio and local cable ads.
- Crucial information was missing in the CMAG data, as for example, in more than a quarter of the broadcast data, the identity of the sponsor was not included in the data (*Buying Time 1998*, 8). Without accurate information about the sponsor of any given ad, the fundamental distinction drawn in *Buying Time 1998* among ads sponsored by candidates, parties, and groups becomes suspect. It appears that in some instances the ad sponsor was identified through methods independent of the CMAG data collection and analysis, although these methods are not thoroughly documented in the Report (e.g., *Buying Time 1998*, p. 8).
- The CMAG data apparently include subjective variables coded by CMAG staff, including judgments of the content of each ad and estimates of the cost of each ad. For example, it cannot be determined whether CMAG captured every ad that included the name of a public official or just those which CMAG deemed to be "political" in nature.

- Finally, no evidence has ever been adduced documenting the accuracy of the CMAG data. Indeed, insofar as the 1998 data were collected and assembled through methods similar to those apparently used in 2000, the lack of accuracy of [9(1 PCS/ER 00009)] the data has been documented.[6]

A second source of data comes from the review of the ads by student coders at Arizona State University. The students were asked to respond to 26 questions about the ads, using printed copies of the storyboards (see *Buying Time 1998*, pp. 193-194, for a copy of the questions asked). The coding sheet has some obvious and important errors (as I discuss in more detail below).

A series of significant questions emerges about the process by which these ads were coded. For instance, it is unclear how the students were recruited, what expertise they had prior to being employed for the project, whether the students had been exposed to Professor Goldstein's classes, whether the students had ideological and/or policy commitments to a particular outcome in the project, etc. Insofar as the 1998 data collection process is concerned, none of these details is presented in the published reports or in other material made available to me. The absence of answers

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6 No detailed description of the 1998 CMAG data has been published or otherwise made available to me. However, in Appendix E to Professor Goldstein's Report for this litigation, he discusses various problems in 2000 with the CMAG data and technology. The data difficulties seem to be numerous and formidable. Given the general trend for technology to improve over time, it is difficult for me to imagine that the 1998 CMAG data are any less problematic than the 2000 data.

to these questions raises questions about the overall accuracy of the data collection process.

The question of how the students were trained to make these difficult judgments is of considerable relevance to the quality of the data they recorded. *Buying Time 1998* discloses nothing about coder training. However, in a 2002 report, Krasno and Goldstein indicate that the student coders received *no training whatsoever,* although I acknowledge that there is some ambiguity about whether this practice (or lack thereof) pertains to both the 1998 and 2000 data [10(1 PCS/ER 00010)] sets.[7] They assert: "This consensus [referring to the students reaching the same conclusions about the "tone" of the ads] is perhaps more remarkable because we chose not to embark on any training program for coders, preferring instead that they use their common sense to give us a better feel of how the average viewer would characterize these ads."[8] If I am correct that the student coders were not trained, then this is a flaw of considerable proportion. Not only are undergraduates at Arizona State University (or, in the case of the 2000 study, the University of Wisconsin) indisputably not a representative sample of the "average viewer," in the absence of training, the students were apparently free to exercise unstructured discretion in coding the ads. Without instruction and guidelines for what

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7 My reading of this report leads me to conclude that Krasno and Goldstein were describing their decision not to train the coders in 2000, but I have seen no documentation to suggest that their coders were trained in some way or another in 1998.

8 Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics 35* (#2, June): 207-212, at page 211. See Exhibit *5*.

constitutes the difference between "providing information or urging action" and "generate support/opposition for candidate" - without training, practice coding, and discussion of coding rules based on the results of the practice coding - I do not believe that undergraduate students coders can make accurate assessments on highly subjective characteristics of these ads. This is, in my judgment, an extremely important limitation to the data generated by the coding process, leading me to have little confidence in the results.

A Data Set in Constant Flux

Based on the data sets on the CDs provided by the Brennan Center and Professor [11(1 PCS/ER 00011)] Goldstein, it is apparent to me that no single *Buying Time 1998* Data Set exists. This is in part due to the fact that Professor Goldstein was (and may still be) continuously making changes in the codes assigned to individual ads and airings. Of course, one would always correct obvious factual mistakes in objective variables, but to alter subjective variables of crucial importance requires a great deal more discussion, transparency, and justification.

Moreover, the motives for making such changes are important. To the extent that one only examines codings that undermine the preferred conclusions, and one does not examine codings supporting the preferred conclusion, asymmetrical bias is introduced in the data set. Under such conditions, confidence in the ability of the data set to produce useful results and conclusions plummets.

The Reliability and Validity of Coding the Ads

Since the accuracy of the coding of each individual ad is unusually important for the results drawn from this data base, it is crucial that the coding procedures and processes receive additional close scrutiny. Social scientists use the term "reliability" to refer to the accuracy of data collection. I will therefore adopt this convention by considering the degree to which the coding of the ads is reliable.

Some of the characteristics of the ads are no doubt easy to code with considerable reliability. Entirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad[9]) present few threats to reliability (although clerical errors are [12(1 PCS/ER 00012)] always possible, if not probable, in a large data base such as this).

However, other crucial attributes are far from being objective characteristics of the ads; instead, they are highly subjective and judgmental. For instance, consider Question 6 (from page *193, Buying Time 1998,* emphasis in the original):

> 6. In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a **particular candidate?**
>
> 1. Provide information or urge action (If so, skip to Question #*19)*
> 2. Generate support/opposition for candidate
> 3. Unsure/unclear

To answer this question requires a large number of subjective assessments. First, some judgment must be made about *whose* purpose is under consideration here. For some ads, the sponsor is readily apparent, but for others it is not, so the coders were often faced with the difficult and ambiguous task of considering to whom or what to attribute "purpose." The unreliability of the coding process is reinforced by the absence of any explicit guidelines for how to ascertain an ad's "purpose."

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9 This comment only refers to the text of the ad. Since the storyboards are only captured in 4-5 second intervals, a telephone number not mentioned in the text but presented visually for a period of less than 4 seconds would not be properly coded with this methodology.

Second, the decisions of the coders on these ads were often overruled by Professor Goldstein. For example, consider the ad entitled "NPLA/Call Feingold and Kohl":

> [Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and disposed of their newborn baby in the dumpster. Most Americans couldn't believe that defenseless human life could be [13(1 PCS/ER 00013)] so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him, it would have been perfectly legal. Instead of murder or manslaughter it would have been called a partial-birth abortion. Killing late in the third trimester. Killing just one inch from full birth. Partial birth abortion inflicts a violent death on thousands of babies every year. Your Senators Russ Feingold and Herbert Kohl voted to continue this grisly procedure. Contact Senators Feingold and Kohl today. Their number in Washington is 202-224-3121. [Announcer]: To join the fight against partial-birth abortion, contact the National Pro-Life Alliance.

The visuals in frames 11 through 14 of the ad read:

> CALL SENS. FEINGOLD AND KOHL
>
> AT (202) 224-3121
>
> TELL THEM TO VOTE FOR THE
>
> PARTIAL BIRTH ABORTION BAN

This ad is especially interesting for several reasons. First, it seems obvious that the central focus of the ad is on the policy issue of whether to ban partial birth abortions. If

one had to speculate about the motives behind the ad, one might reasonably judge that the ad sought to capitalize on the widely publicized incident in Delaware as a means of generating support for a congressional ban on partial birth abortions.[10] One might also reasonably conclude that one purpose of the ad was to elicit support for the National Pro-Life Alliance. The most reasonable [14(1 PCS/ER 00014)] overall assessment of this ad is that it is an example of issue advocacy by an interest group.

The student coders at Arizona State University recognized this as an issue ad, originally coding it in Question 6 as: "1. Provide information or urge action". However, subsequent to that coding, the data were apparently changed so that the value in the data set of variable Q6 (representing the coding of Question 6) is: "2. Generate support/opposition for candidate." After the coding process was completed, Professor Goldstein apparently decided to overrule the judgment of the coders and substitute his own view that this ad represents electioneering.[11] Though this decision was apparently controversial - indeed, it is striking that one of the authors of *Buying Time 2000* concluded in an e-mail to Professor Rick Hasen: "It reads to me like a

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10 Note that the number depicted in the ad is the telephone number of Congress.

11 One of the authors of *Buying Time 1998* reports that the data set was constantly evolving over time. Worse, it is not possible to "track the evolution of all the changes we made." See Seltz Deposition, p. 52, lines 20-21. (Exhibit 4.) Moreover, my comparison of the student coding sheets for several of the 1998 storyboards with the scores in the "final" version of the data reveals several instances of inconsistency, which apparently were brought about by the postcoding manipulations of Professor Goldstein.

genuine issue ad."[12] — since the final version of the data base supplied to me records this as an electioneering ad, Professor Goldstein apparently thought otherwise, and thus the Buying Time studies (in both 1998 and 2000) treated this as a "sham ad."[13] This process hardly contributes to the reliability of the variables in the data base. [15(1 PCS/ER 00015)]

I have examined the actual student coding sheets for 25 of the 1998 storyboards[14] and have compared them to the "final" version of the 1998 data set. Focusing on the coding of the extremely important question requiring the coders to ascertain the "purpose" of the ad, I discovered that changes were apparently made in at least eight ads between the student coding and this version of the data base.[15] On its

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12 Exhibit #14, Holman Deposition. E-mail on 01/18/2001 from Luke McLoughlin (one of the authors of *Buying Time 2000)* to Rick Hasen. (A copy of the E-mail is attached as Exhibit 6.)

13 I understand that Professor Goldstein has indicated in his expert report of September 23, 2002, that he now views this ad (when broadcast in 2000) as a "genuine issue ad." The data set provided to me does not reflect any re-examination of this ad (which also aired in 1998). Rather the data set indicates that it was recorded by Professor Goldstein as a "sham ad."

14 The id numbers for these coding sheets are: 2, 7, 10, 11, 12, 15, 16, 21, 22, 605, 797, 1043, 1045, 1355, 1374, 1411, 2406, 2512, 2521, 2531, 2532, 2533, 2637, 2640, and 3024. I also examined the coding sheets for ad #137, but since there are two separate sheets for this ad, and since the sheets do not agree between themselves on some of the codes, I have excluded that ad from this analysis.

15 The coding sheets and the storyboards for these eight ads

face, eight may not seem like an especially large number, but these ads are responsible *for over 2400 airings* in the 1998 data base. Furthermore, considering the 20,432 airings in 1998 coded as sponsored by groups and as independent expenditures or issue ads, making Professor Goldstein's changes on just these 8 ads results in the percentages of ads said to be providing information or urging action decreasing from 70.2 (based on the original student coding) to 58.4% (based on the Goldstein recoding). Moreover, the changes in the data base are entirely asymmetrical: In not a single instance in these storyboards was a change made on an ad originally coded as having candidate support or opposition as its "purpose." Since no documentation of how individual ads were selected for reconsideration by Professor Goldstein has apparently been produced, one is left wondering why all of these changes could have had the same effect: issue ads being converted to candidate support ads. My most important observation is thus that the changes apparently made by Professor Goldstein have a rather dramatic impact on whether these ads are considered to be [16(1 PCS/ER 00016)] issue- or candidate-oriented.

There can be little question that the undergraduates were asked to make difficult subjective assessments of ads that are often ambiguous and ambivalent. How accurate are these subjective judgments? Social scientists do indeed often attempt to quantify subjective phenomena. But in doing so, certain procedures are essential so that the reliability of the data collected can be assessed. The methodology that is necessary involves the assessment of "intercoder reliability."

One common meaning of reliability is the ability to replicate or reproduce results. Consequently, a proper methodology for assessing inter-coder reliability would involve the following procedures.

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are attached as Exhibit 7 to this report.

1. The ads are coded.

2. A sample (or the population) of the ads is coded for a second time by an independent coder, using exactly the same procedures as the initial coding. The sample is typically randomly selected, although stratified sampling is sometimes used (e.g., to assure the inclusion of infrequently occurring types of cases). It is necessary that all procedures on the subsequent coding be identical to those of the initial coding, therefore precluding, for example, the use of "expert" or highly experienced coders for the subsequent coding.

3. A variable-by-variable assessment of the two codings is then conducted. An inter-coder reliability coefficient is calculated for each variable that indicates the degree of consensus between the codings. Thus, coding cases should not be said to be reliable; reliability is an attribute attaching to individual variables. [17(1 PCS/ER 00017)]

Using these procedures, one can assess the degree to which subjective phenomena have been coded reliably.

Social scientists care about more than reliability; they also care dearly about validity. One's bathroom scale can produce reliable results day after day, but if the scale is not properly calibrated, the results are not valid in the sense that the weight the scale reports is not an accurate representation of one's true weight (in this instance, many of us prefer results that are not valid). It is possible, for instance, that coders could reliably but invalidly code an attribute of the ads. For instance, assume that the coders are asked to judge whether the "purpose" of an ad is to "generate support/opposition for candidate" [sic - from the 1998 coding form]. Assume further that this is a highly subjective

judgment.[16] Consequently, coders must seek easily discernable "cues" in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: "when a political figure is depicted in the ad, the ad involves electioneering." Using this rule, the variable might be reliably coded. But this does not mean that the data are *valid,* since political figures appearing in ads could well be doing something other than electioneering. Reliability is the *sine qua non* of useful analysis of subjective data, but reliability must also be considered in the context of validity. Without validity, the meaning of the [18(1 PCS/ER 00018)] variables is conflated and confused. Thus, it is crucial to consider both the reliability and validity of the data produced by Professor Goldstein.

Unfortunately, the 1998 study apparently involved no assessment whatsoever of intercoder reliability. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate. This is a very serious flaw in the methodology of the study, especially since

16 There is apparently no dispute among any of those involved in producing the Buying Time reports that the coding of these attributes of the ads is highly subjective - e.g., (as I have previously cited), *see* Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-Feingold Bill." *PS: Political Science and Politics* 35 (#2, June): 207-212, at page 207 and at page 209 (see Exhibit 5). See also the Holman Deposition, pages 68, 72-73 (referenced excerpts from the Holman Deposition are attached as Exhibit 8), and the McLoughlin Deposition, page 38 (referenced excerpts from the McLoughlin Deposition are attached as Exhibit 9).

the crucial variables under consideration require highly subjective judgments. Furthermore, as I demonstrate below, the consequences of error can be enormous in the sense that any coder errors are reproduced in the data base for every single airing of the advertisement.

The problems of unreliability and invalidity are exacerbated when non-expert data collectors are employed to code the data, as in this study, which employed undergraduate students at Arizona State University. At present, few details about the ways these students were recruited and trained have been reported, and we therefore do not know whether the students were competent to make the subjective judgments required by the coding process. (As noted, we do know that the students were *not* subject to any formal training process.) With student coders, however, it is highly probable that implicit coding rules evolved to aid the coders in making these subjective assessments of the advertisements.

Moreover, coding these advertisements is often simply difficult, irrespective of one's training and experience. For instance, the attributes of an individual airing are specific as to time. Consider a hypothetical ad depicting Senator Ted Kennedy. That ad, if shown in Boston in a year in which Senator Kennedy is a candidate for re-election, would be characterized as depicting a candidate for office. If shown two years later (when Kennedy is not a candidate for re-election), [19(1 PCS/ER 00019)] the identical ad should not be scored as depicting a candidate for office.[17] One must bring considerable knowledge to bear in making the various assessments of these ads. Thus, the lack of information

17 *Buying Time 1998* provides no information concerning how information about who was and who was not a candidate in any given airing of an ad was made available to the student coders.

about the reliability and validity of the coding is a very serious shortcoming of the 1998 study. In the absence of evidence that the coding of the ads is reliable and valid, one must approach these data with great caution.

Analysis of the 1998 Data

For the purposes of this report, I have relied on what purports to be the "final" version of the 1998 data set.[18] This file was provided to me as an SPSS[19] file named: 'Final. 1998_Cmag.sav'.[20] I understand that this file was produced by Professor Goldstein for the purposes of this litigation. Upon reviewing this data set, I discovered that the original raw data files - the files produced by CMAG for the airings and the data file Professor Goldstein produced from coding the ads themselves - had already been integrated (matched and merged), and the data had been documented (with labels, to the limited extent to which the file is [20(1 PCS/ER 00020)] documented) in a single file. Though this process of merging data is fraught with difficulty and potential for error, I have not been given any material that would allow me to

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18 I put the word final in quotations marks because, as I understand the practices of Professor Goldstein, the data base is continuously subject to change and revision (as I have noted earlier).

19 SPSS is statistical software that is widely used to analyze data of this sort.

20 Frankly, the statistical analysis reported in *Buying Time 1998* is not at all transparent. In my analysis in this report, I have tried to provide sufficient details so that other analysts can reproduce my results. For the not-too-statistically inclined, the detail may seem excessive, even if it is recognized as necessary. For that, I apologize in advance.

judge the accuracy of the data merging. Indeed, one sees telltale signs in the data set that this match/merge process was not executed flawlessly (e.g., the assignment of the same identification number to ads with vastly different titles).

The total data set has 307,208 airings. The distribution of sponsors of these ads is as follows:

	Number of Airings
missing, unknown/not coded[21]	4,745
Candidate	235,613
Party	44,924
Group	21,926
Total	307,208

Since my report addresses only group-sponsored issue advertisements, I confine all of my analysis to the 21,926 airings coded in the data set as ads having been sponsored by groups.

Analysis of these data can be conducted using different "units of analysis." For instance, one approach would be to focus on the ads themselves. In the 1998 data base, there are over 100 [21(1 PCS/ER 00021)] discrete ads.[22] Such an

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21 When no code is provided for an airing, the computer program inserts a "missing value" code. In SPSS, this code is printed in the output as a period (i.e., ".") and is referred to as a system-missing code (assigned by SPSS as missing because the program had no other way to interpret the input data). In this data set, missing data (of this and other types) are extremely poorly documented, leaving one with little ability to discern the exact cause of missing codes.

22 There are errors in the data base in how the ads are identified. There are two possible unique identifiers for each ad: the variables IDNUMBER and CUSTITLE. As

approach is generally misleading because different ads are aired at vastly different rates. For example, ad number 12 (AFL/HMO Said No) was aired 2,808 times, according to the data base, while ad number 3026 (SIERRA/World is) was aired only a single time. To treat these two ads as equivalent makes little sense if one is interested in potential influence on the electorate.

The second "unit of analysis," the one preferred by me and generally by the authors of *Buying Time 1998,* is the "airing."[23] This is the individual showing, which is of course

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it turns out, however, neither is unique. In most instances, the errors seem to be harmless, resulting from data entry mistakes. For example, I assume that the following two descriptions refer to the same ad: AFJS/Stabeno and AFJS/Stabenow Tu. Four discrete identification numbers suffer from this sort of malady.

However, ads with the id number 3431 seem to have a more serious mistake. The two titles that appear with this id number are:

NRA/Sorvino your and NV/CFCD/Not Abov. It is difficult to reconcile how these two ad titles could both be given the ad identification number of 3431.

I recognize that an ad may be coded differently when it is broadcast in different media markets. The process by which the identification numbers are assigned to the ads and airings is nowhere discussed in *Buying Time 1998.* A proper unique identifier would be one that is a combination of the ad identification number and the specific context within which it was aired. Such an identifier does not exist in the data base.

23 One might quite reasonably use other units for conducting useful analysis of this data base, as, for instance, in measuring ads in terms of the number of minutes they

specific as to time and place. For instance, precisely the same ad may be aired in more than one media market and at more than a single point in time.

To reiterate, in the 1998 "final" data set, there are 21,926 airings sponsored by groups. However, for purposes of this analysis I will focus on the 20,432 group-sponsored airings in the data base coded as issue ads. [22(1 PCS/ER 00022)]

I consider the airings to be the appropriate unit of analysis for a study of this sort, and in fact *Buying Time 1998* relies on this unit for most of its analysis. However, it is important to note at the outset that a single discrepancy in coding an ad can have considerable consequences for the analysis of the airings data base. Let me give an example.

In the 1998 data base, Question 6, assessing the "purpose" of the ad, reveals that a majority of the airings had as their "purpose" providing information or urging action. The variable is distributed as follows:

	Percentage of Cases
Missing, not coded	3.3
Provide information or urge action	58.4
Generate support/opposition for a candidate	37.2
Unclear	1.0
Not coded	0.1
Total	100.0
N	20,432

Let us assume for a moment that the coding of a single ad was erroneous; in particular, assume that ad #11 was coded as "promoting issues" (provide information or urge action) rather than "promoting a candidate" (generate

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were aired.

support/opposition for a candidate).[24] If the coding of *only* this single ad changed, then the distribution of the "purpose" variable becomes: [23(1 PCS/ER 00023)]

	Percentage of Cases
Missing, not coded	3.3
Provide information or urge action	64.6
Generate support/opposition for a candidate	31.0
Unclear	1.0
Not coded	0.1
Total	100.0
N	20,432

By changing the coding of only a single *ad,* the percentage of *airings* promoting issues rises from 58.4% to 64.6%, or a change of over 6 percentage points. This example illustrates just how volatile this data base is, and how very small errors in coding can be amplified substantially (with significant implications for substantive conclusions). Obviously, the consequence of an error in coding the attributes of an individual advertisement varies according to the frequency with which that ad was aired. I provide this example merely to illustrate that for some ads, a single small error can have quite large consequences for the statistical results. This means the statistical findings of the study are not robust; they are instead highly sensitive to error.

General Comments on the Accuracy of the 1998 Data

The 1998 data provided by the Brennan Center/Professor Goldstein are riddled with internal inconsistencies and

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24 I do not here make the allegation that the coding of this ad was in error. I am merely using this example to illustrate the consequences for the analysis of the coders making a single mistake in coding one of the attributes of an advertisement.

errors.[25] One important consequence flowing from this problem is [24(1 PCS/ER 00024)] that virtually none of the results in the 1998 report could be reproduced with any of the data sets made available to me.[26] This seriously undermines my confidence in the substantive conclusions drawn in the report.

The discrepancies are numerous. A few examples can illustrate the inconsistencies in the data set.

Number of media markets represented:

Buying Time 1998 (p. 78):	75
"Final" data set:	76

Number airings analyzed in the report:

Buying Time 1998 (p. 32):	302,860
"Final" data set:	307,208

Number of group-sponsored airings:

Buying Time 1998 (p. 32):	22,151
"Final" data set:	21,926

[25(1 PCS/ER 00025)]

Many additional inconsistencies could be noted; because they are not documented in *Buying Time 1998* or any other

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25 The report also seems to have engaged in the practice of rounding all percentages less than 1.0 up to 1. Thus, according to my calculations, the 1% reported in the first portion of Figure 1.3 on page 15 is actually 0.2%. This rounding convention is not part of accepted social science practice.

26 Even more confusion is added if one tries to use the data available on the Buying Time web site to reproduce the results. See http://www.buyingtime.org/

material I have reviewed, one wonders how these discrepancies arose.[27]

Many variables in the data set are not properly documented; indeed, many variables have no documentation whatsoever. For instance, one of the most important variables in the data is that which describes the ad type. Two variables seem to represent this information: WHAT and WHAT4. The former is entirely undocumented while the latter's variable label in the SPSS data set read "four category ad type" and the values of the codes are listed as "1 cand camp" "2 coord exp" "3 ind exp" "4 issue ad". Thus, the implication seems to be that WHAT4 is the preferred depository of this information. However, when one tries to reproduce the figures in Figure 1.3 (for example) on page 15 *of Buying Time 1998,* the figures are more consonant with WHAT than with WHAT4, which, to say the least, is puzzling and confusing.

What is the difference in the coding of the two variables? Two differences occur. First, some of the airings coded as missing by WHAT4 in fact have valid values on WHAT. Second, a portion of the airings coded at 3 on WHAT are coded as "3 ind exp" on WHAT4, while another portion is coded as "4 issue ad." The distribution of the two variables is as follows. [26(1 PCS/ER 00026)]

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27 I should perhaps note that the technical difficulty of merging data sets drawn from different sources and collected under different circumstances is substantial, and likely requires someone with considerable experience with statistical and data management software.

	Frequencies on WHAT[28]	Frequencies on WHAT4
missing	97	195
cand camp	342	342
ind exp	1,055	1,281
issue ad	20,432	20,108
Total	21,926	21,926

Thus, there is a great deal of confusion here. The most important implication is simple: The data provided cannot be used to replicate the findings *of Buying Time 1998.*

For purposes of my own analysis, I will focus on group sponsored ads that are coded as issue ads on the variable WHAT. There are 20,432 such airings sponsored by groups. These 20,432 airings represent approximately 117 individual advertisements. Exhibit 10 to this report lists the titles of these ads and includes each storyboard made available to me.

The Characteristics of Group Sponsored Issue Ads Aired Within 60 Days of the Election, 1998

Of considerable importance in analyzing the *Buying Time 1998* data are group-sponsored ads having the following characteristics: [27(1 PCS/ER 00027)]

1. Aired within 60 days of the election

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28 The categories are not labeled on this variable so I have had to make some assumptions about the meaning of the individual codes. For instance, when I see that 20,108 airings appear in the data base in an unlabelled category, I make the assumption from the size of the group in comparison to the frequencies on the labeled variable that the meaning of this category is "issue ads." This is course an inference that may or may not be correct, but I have found no other source of documentation that would allow me to make more certain judgments about the meaning of the variables in the data set.

2. Do not contain "magic words"

3. Mention or picture one or more candidates

The final version of the 1998 data set provided by Professor Goldstein reflects a total of 6,640 group-sponsored airings have these characteristics.[29] Of the 6,640 airings with these attributes,

57.7% were coded as promoting candidates

42.3% were coded as promoting issues

In this "final" version of the data base, these 42.3% airings stem from a single ad —

12. AFL/HMO Said No

The 57.7% airings stem from 26 ads. The most common such ad is

11. AFL/CIOStrengthe

The full listing of the ads coded as "promoting candidates" follows:

ID Title	Number of Airings
2 AAHP/Look Out Fo	77
7 AFJS/Stabeno	129
9 AFL/Chavez His L	11
10 AFLCIO/Call ES	17
11 AFLCIO/Strengthe	1265
15 AFL/SS Trust Fun	575
16 AFLT/Stand Up Fo [28(1 PCS/ER 00028)]	142
17 AFLT/OR People S	45
20 AFLT/Call WU	5
21 AFTL/KY Lucas	1

29 Note that these airings represent a tiny fraction of all airings in 1998.

22 AFTL/WI Tell Rya	213
137 AVO/Ashcroft Val	55
1043 MI/MICA Bonior L	108
1045 MICF/Fieger Stab	167
1355 NJ/AFJS FPallone	72
1411 NPLA/Call Feingo	3
2406 WI/ LCWAF Neuman	71
2512 AFL/PBR Call Tod	10
2521 AFLT/Call WU Rev	39
2531 AFTL/KY Stop Wil	76
2532 AFTL/UT Cook Sig	35
2533 AFTL/Willams is	210
2637 IA/Bosewell Edu	129
2860 NM/DCCC Redman D	281
3024 SIERRA/NC Faircl	4
3431 NV/CFCD/Not Abov	92

The testimony in this case reflects that the authors of *Buying Time 1998* regard *two* ads as genuine issue ads aired within 60 days of the 1998 election: ad #12 and ad #318. See Seltz [29(1 PCS/ER 00029)] Deposition, pages 100-102 (Exhibit 4); Holman Deposition, pages 50-53 (Exhibit 8). For reasons that are unclear to me, in this "final" version of the 1998 data set, ad #318 is coded as an issue ad, aired within 60 days of the election, but *not* as depicting a candidate.[30] On the basis of the depositions, I have accepted the author's judgment that the ad should be coded as depicting a candidate and have therefore treated it accordingly. As a result, the distribution of the "purpose" variable, based on 6,896 airings, then becomes:

30 Note that in some versions of the 1998 data base made available to me by the Brennan Center this ad is in fact coded as depicting candidates. I have no information about how, why, and when the codes for this ad were altered.

55.6% were coded as promoting candidates

44.4% were coded as promoting issue

Of course, the source of the 44.4% of the airings is two ads: #12 and #318.

It is important to take note of a highly significant attribute of the coding sheets for the 1998 ads. As reported on page 193 *of Buying Time 1998,* ads coded in Question 6 as "provide information or urge action" should *not* have been coded on *any of the variables indicating whether candidates were depicted or not.* When coders scored an ad as "providing information" on Question 6, the coding form says: "(If so, skip to question # 19)." That is, every single ad that was coded in 1998 as providing information or urging action should have been coded as "not applicable" on questions 7 through 18, *since the coders were not asked to make a judgment about these questions.* Thus, if the coders performed as instructed by the coding sheet, there would never be in this data base an ad that is coded as both providing information and depicting a candidate, since that information is captured in Questions 7 and 8. Thus, if one is interested in ads that provide information while depicting candidates, this data set, by the design of the coding [30(1 PCS/ER 00030)] form, can say absolutely nothing about these ads. To the extent that the data set includes information about the depiction of candidates for these ads, such information must stem from either (a) coders who ignored the instructions on the coding form, or (b) changes made to the data base after the students coded the data. It is unclear why an investigator interested in ads that both provided information and depicted candidates would design such a coding form. More important, the confusion in the instructions regarding Questions 7 through 18 may have introduced a degree of bias into how the students coded Question 6 by suggesting that any advertisement that included the name of a candidate should be coded as having a purpose of promoting or opposing a candidate.

The data base includes 7,606 group-sponsored airings coded as having a "purpose" of generating support or opposition to a candidate. My analysis reveals that *fully 97.7% of these airings were also coded as mentioning candidates.* The most important conclusion I draw from this analysis is that mentioning a candidate and promoting a candidate are virtually the same thing, as these data were coded by the undergraduate students (and/or Professor Goldstein). It seems highly likely to me that the student coders coded these three questions (6, 7, and 8) virtually simultaneously: A candidate (or what the coder thought was a candidate) was observed in the ad, and then Question 6 was coded as electioneering (in part because the coders knew that the presence of a candidate was not coded if Question 6 was coded as providing information), and then the student made the determination of whether the candidate was "the favored candidate" (Question 7) or the "favored candidate's opponent" (Question 8). Thus, the entire relationship - empirical and logical - between Questions 6 and Questions 7, and 8 renders the data set of little utility for answering important questions about these ads and airings. [31(1 PCS/ER 00031)]

The Focus of the Ads

As I have noted, *Buying Time 1998* places considerable emphasis on ads with three characteristics: those aired within 60 days of the election, which mention one candidate or the other, and which do not use so-called magic words.[31] As noted, this group represents 6,896 airings.

The authors *of Buying Time 1998* apparently believe it appropriate to consider prohibiting or regulating ads depicting candidates aired within 60 days of the election if in

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31 Of course, were the ads to use so-called magic words, they would be characterized as express advocacy under *Buckley v. Valeo,* 424 U.S. 1 (1976).

fact the content of these ads is nothing more than what they characterize as electioneering (the promotion of candidates, not issues). As I have noted, according to the coding in Q6, the bulk of these ads (55.6%) was judged to be promoting candidates. I will refer to these ads as possible "candidate promoting issue ads," by which I mean that they appear to be issue ads (sponsored by groups, not using "magic words"), but that they were coded by the undergraduate students as promoting candidates rather than promoting issues. It is instructive to consider these ads in greater detail.

The undergraduate students were also asked to code Question 22. It is useful to reproduce the exact content of Question 22 (from page 194 of the Report):

> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics
> 2. Policy matters
> 3. Both [32(1 PCS/ER 00032)]
> 4. Neither

This variable is also given special attention in the Report on page 196 (see the variable "Focus"). One might predict that these possible "candidate promoting issue ads" ads would *not* be coded as primarily addressing policy matters; instead, they should be overwhelmingly coded as "personal characteristics" or "neither" personal characteristics nor policy.

In fact, that expectation is *not* supported by the data; instead, exactly the contrary conclusion is revealed by the data analysis. The coding on Question 22 for the 6,896 airings aired within 60 days of the election, the results are:

Question 22 Code	Percentage
missing	0.1
Personal characteristics	1.2

Policy matters	98.1
Both	0.7
Neither	0.0
Total	100.0
N	6,896

Thus, *virtually all* of the ads aired within 60 days of the election and depicting a candidate were coded as having a **"primary focus"** on policy matters. Thus, virtually of these ads have clear and obvious policy content. This is a very important conclusion that bears considerable emphasis:

> *More than 98% of the group-sponsored ads broadcast within 60 days of the 1998* [33(1 PCS/ER 00033)] *election and depicting one candidate or the other were coded by the coders (or Professor Goldstein) as having policy matters as their "primary focus."*

How should this result be understood within the context of the coding of Question 6? It is obvious that many ads were coded in Question 6 as promoting candidates but also as being "primarily" focused on policy matters in Question 22. Is it reasonable that coders would have coded the ads on these variables in this fashion?

I believe so, since Questions 6 and 22 differ in several obvious and extremely important respects. Question 6 requires that the undergraduate coder make a rigid distinction between two "purposes" of the ad. The specific question answered by the student is (from page 193, emphasis in the original):

> 6. In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a **particular candidate?**
>
> 1. Provide information or urge action (If so, skip to Question #19)

2. Generate support/opposition for candidate

3. Unsure/unclear

Note that in Question 6, the coders are not given the option of responding that the ad *both* provides information or urges action *and* generates support or opposition for a particular candidate. In the event of mixed content, the undergraduate coders were forced to make a [34(1 PCS/ER 00034)] dichotomous judgment about the ad's "purpose."[32] Question 6 does not ask the coder to discern the "primary" purpose of the ad. Indeed, the question provides no guidance whatsoever as to how to code mixed-content ads.

In contrast, the construction and coding of Question 22 is an improvement over Question 6 in a number of respects. First, the question allows the coders options of "3. Both" and "4. Neither". Thus, the problem of forcing a choice between different parts of the manifest content of the ad is resolved by allowing a coding of "mixed" content. One wonders why such a strategy was not used on Question 6, especially given its use by Professor Goldstein in Question 22. Second, the question provides at least some guidance for how to make the judgment required, telling the coder to consider the "primary focus" of the ad. This is still a difficult coding decision for the student coders — and there is no evidence that coders were trained or given formal coding rules for how to resolve ambiguity and ambivalence — but Question 22 is structured in such a way as to provide more reliable information than Question 6.

It is also revealing to note some of the characteristics of the ads coded as "candidate-promoting issue ads."

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32 As I have discussed earlier, it is impossible for the coders to have known anything about the ad-maker's "purpose" or intention in broadcasting the ad, since such information was entirely unavailable to the coders.

According to the coders, the 6,896 airings in 1998 have the following characteristics:

95.6% of the airings urged the viewer to take some action

74.3% of these were coded as providing a toll-free telephone number in the ad

Another 18.4% of the airings provided a toll number

4.4% were coded as missing data [35(1 PCS/ER 00035)]

And only 2.9% were coded as providing no telephone number

45.7% were coded as addressing health care issues

30.1% were said to address the issue of taxes, and

27.8% addressed the Social Security issue.

And, of course, as already mentioned

98.1% were coded as having policy matters as their primary focus.

Thus, these ads certainly have quite a number of characteristics of what the authors of *Buying Time 1998* refer to as "genuine issue ads."

Thus, several conclusions emerge from analysis of these data:

1) The coding in Question 6 is deeply flawed.

2) When Question 6 and Question 22 clash (i.e., the coded attributes differ), the coding of Question 22 should be considered more valid and reliable.

3) According to the coding, the vast and overwhelming majority of ads said to be examples of illegitimate

electioneering (by virtue of promoting candidates) in fact were judged by their own coders to have "policy matters" as their "primary focus."[33]

The 7% Figure in *Buying Time 1998* — Deconstructing Figure 4.22 and Page 109

For the purposes of my analysis, perhaps the most relevant section *of Buying Time 1998* [36(1 PCS/ER 00036)] is Figure 4.22 (page 110) and the text purporting to interpret this figure (page 109).[34] It is crucial to understand the analysis that underlies this text (and the depositions have spent a great deal of time on this text and figure). With only a single paragraph of *Buying Time 1998* devoted to this crucial issue (the second paragraph on page 109), one can surmise that the Report left a great deal unsaid.

The conclusion drawn on page 109 is as follows:

> The results show that while 41 percent of issue ads that provide information or urge action appeared within 60 days of the fall election, just 7 percent of those ads

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33 It is perhaps obvious but nonetheless important to note that in many if not most instances, the person who is a candidate for public office is also an *office-holder*. Thus, whatever else they might be, many of these ads are direct efforts to influence the actions of sitting elected representatives.

34 Note that Figure 4.21, page 108, has a fairly obvious error in it. The figure for 30 second ads in September is reported as 97%. In fact, the figure seems to be 87%. This can be readily seen because the point on the line depicted at 97% is in fact lower (has a smaller score on vertical axis) than the adjacent point of 91% (for the first half of October).

> (consisting of just two spots) appeared within 60 days and referred to a candidate.[35]

In his deposition, Mr. Seltz affirmed that, even now, he stands behind this conclusion as accurate (page 77).

Focusing on the 20,432 group-sponsored airings in the 1998 data base, I find that 38.5% of the airings promoting issues were aired within 60 days of the election. Thus, a significant majority of the airings (61.3%) were aired earlier than two months before the election.[36]

The authors of *Buying Time 1998* also claim that: [37(1 PCS/ER 00037)]

> ....just 7 percent of those ads (consisting of just two spots) appeared within 60 days and referred to a candidate.

The "those ads" phrase clearly refers to "issue ads" — the 11,939 airings in the data base. The question as the authors have framed it then becomes: Of the 11,939 airings, what percentage have *both* the characteristics of having been aired within 60 days of the election *and* referring to a candidate?

According to the version of the data base designated as the "final" version, the answer to this question is 25.7% (3,064 airings divided by 11,939 airings = 25.7%). Because this figure is so widely contested — and because so many different percentages have been proposed as being correct —

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35 Note that in the terminology that has emerged, and in the terminology of this report, the "7 percent of those ads" phrase in the quoted text should be understood as "7 percent of those airings" and the "consisting of just two spots" actually means "consisting of just two ads."

36 These percentages do not total to 100% because the data base includes 16 airings (0.1%) for which the date of the airing is unknown.

it is useful to examine the data with great care. The following table does so:

Group-Sponsored Airings Having as Their "Purpose" Providing Information or Urging Action (N = 11,939)

	Date of Airing		
Was a candidate mentioned or pictured in the ad?	More than 60 days before the election	60 days or closer to the election	Missing
Yes	0.0% (0)	25.7% (3,064)	0.0% (0)
No	61.3% (7,324)	12.9% (1,535)	0.1% (16)
Column total – Number of airings	7,324	4,599	16

Note: Total number of airings = 11,939. Cell entries are percentages of the total (11,939) and the number of airings in the cell. Thus, the 3,064 airings aired within 60 days of the election and depicting a candidate represent 25.7% of the 11,939 group-sponsored issue airings in the data base.

[38(1 PCS/ER 00038)]

This table is based on a denominator of 11,939, which represents *all* issue ads aired in 1998. All percentages in the table reflect that denominator (the numbers shown in parentheses are the actual numbers of airings). Thus, the first cell in the table indicates that 0% of the 11,939 issue airings (which is 0 actual airings) were shown more than 60 days prior to the election and depicted a candidate. The next figure in the table, 25.7%, indicates that of the 11,939 issue airings in the data (the total 1998 issue airings), 25.7% (or 3,064 actual airings) mentioned a candidate and were shown within 60 days of the election. Thus, according to this data base, were one to assume that all ads shown within 60 days of the election and depicting a candidate were electioneering

ads, one would be wrong 25.7% of the time. Or to put this in terms of actual airings, one would make 3,064 mistakes by assuming these airings to be electioneering ads.

Of course, using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The authors of *Buying Time 1998* selected a denominator for their calculations that has no theoretical meaning. Consequently, their choice is arbitrary. Unfortunately, their conclusions depend heavily on this choice.

What choice for a denominator would not be arbitrary? The pool of cases one might want to examine would be those aired within 60 days of the election. Suppose the question is:

> I will assume that all ads aired within 60 days of an election and which depict a candidate for public office have a particular characteristic (i.e., they are engaged [39(1 PCS/ER 00039)] in electioneering). What percentage of the time would this assumption result in an error in the sense that the assumed characteristic is not the same as the actual characteristic?

This question demands that one use a denominator of all airings shown within 60 days of an election and which depict a candidate. This is not an arbitrary choice of denominators. Instead, this is the only reasonable denominator that answers this question.[37]

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37 As an analogy, when we ask: What percentage of jury trials falsely convict the innocent, we use as a denominator those defendants who are at risk (those who go to trial) and do not include those defendants who have their charges

The denominator chosen by the authors of *Buying Time 1998* relates to an entirely different, and virtually meaningless question: What percentage of the total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election? Since, as noted above, the coders coded virtually all of the advertisements that mentioned a candidate by name as promoting a candidate, the percentage of such ads must be very small. However, this tells us nothing about the error rate over the course of the entire year or even in the 60 day period.

Using the 1998 data, I have run the analysis necessary to answer the more meaningful question. There are 6,896 airings in the denominator. To repeat, these are airings that were shown within 60 days of the election and which depicted a candidate (and, of course, which did not use so-called magic words). Of these airings 44.4% were coded as intended to promote issues. Thus, to answer the question posed above, *the assumption that these airings are electioneering ads* [40(1 PCS/ER 00040)] *would be wrong (empirically disproved) for 44.4% of the airings (3064 actual airings).*

There is quite some difference between a figure of 7%, reported in *Buying Time 1998,* and my calculations of 44.4%. How could there be such a large discrepancy?

The discrepancy is due in part to the use of different denominators (although using a conceptually equivalent denominator — all issue ads shown in 1998 — my estimate is 25.7%, not 7%). But the discrepancy is also very much a function of the after-the-fact recoding of airings by Professor Goldstein. As it turns out, the student coders may not have

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dismissed prior to trial (because they are not at risk at a trial).

done a valid job of coding the questions about whether candidates were depicted because they did not have the information about where the ad was broadcast. Thus, Questions 6, 7, and 8 could not be reliably and validly answered by the coders.

Through various unpublished and undocumented machinations, it appears that only a portion of the airings of ad #12 and #318 were eventually counted as "genuine issue ads" by the authors of the 1998 report. These are airings depicting a political figure that aired in areas in which that political figure was not a candidate for office. There is some confusion about the exact locations in which such ads were broadcast (e.g., it seems that Pittsburgh was often referred to as Philadelphia).[38] But for the correct figure to be 7%, as claimed by *Buying Time 1998,* the numerator must be approximately 836 airings. That is,

836 / 11,939 = 7% [41(1 PCS/ER 00041)]

Without conceding the numerator (because the codings of airings have changed so frequently and are not necessarily represented in the "final" version of the data set), it is important to understand exactly what this fraction depicts. The numerator is limited to ads appearing within 60 days of the election. The denominator refers to *all airings* of issue ads shown in 1998. As I noted above, however, a

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38 I believe this confusion stems mainly from the fact that neither Professor Goldstein nor the authors of *Buying Time 1998* nor CMAG has storyboards for each unique ad. Since the CMAG software cannot distinguish between ads that are generally the same but that substitute the name of different political figures in different airings (so-called cookie cutter ads), CMAG treats the airings as identical and does not capture a storyboard for each unique ad. Consequently, it cannot be known with certainty whether a particular ad mentions a candidate or not.

considerable proportion of these ads represented in the denominator were broadcast well before the election season even began. I can see no justification for making the denominator equal to all issue ads aired in 1998.

Returning to the data base, let us reconsider the Report's finding using issue ads aired within 60 days of the election. There are 3,064 issue airings shown within 60 days of the election and depicting candidates. If we assume that just 836 of these are valid (and this assumption should not be accepted as an accurate depiction of reality), then the percentage becomes:

836/3,064 = 27.3%

It is important *not* to accept the numerator of this quantity as 836 since it represents so many data manipulations after the fact (i.e., after the student coding). But if we assume that the authors of *Buying Time 1998* have reduced this figure to its smallest possible quantity, then the proper conclusion from their calculations, as measured against this data base, is that at least 27 percent of the ads would be improperly restricted by a rule banning or regulating ads depicting candidates within 60 days of the election. From my calculations above, this figure may range to as high as approximately 45% of the airings in 1998.

From page 109 and the accompanying data in *Buying Time 1998,* as well as from the data base itself, one can surmise that the report considers about 5,064 issue airings as having been [42(1 PCS/ER 00042)] shown within 60 days of the election.[39] With this denominator one can deduce the

39 This estimate is the quantity: 408 • 12,411. The 12,411 is number of issue ads in the data base (irrespective of how the ad type is coded). The .408 is my calculation from the data base of the percentage of such ads that were aired within 60 days of the 1998 election. Note that the figure .408 is entirely compatible with the claim on page 109 of *Buying Time 1998* that "41 percent of issue ads that provide information or urge action appeared within 60 days of the fall election."

percentage of ads aired within 60 days of the election, depicting candidates, without using "magic words," but which had as their "purpose" providing information or urging action. If we accept the Buying Time numerator of 836 (and I repeat that I do not accept that figure), then according to the Brennan Center calculations, this percentage would be

836/5,064 = 16.5%

Thus, even accepting the flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days), 16.5% of the group ads were "genuine issue ads" (as defined by the Brennan Center) that would be, in the words of the Brennan Center authors, "unfairly caught by" application of the three criteria that I understand were adopted by the Bipartisan Campaign Reform Act (BCRA).[40]

The primary reason why I do not accept the numerator in this quantity is that it represents the post-coding manipulations of the variables by Professor Goldstein. If we return to the eight ads that the students determined were intended to provide information before they were overruled by Professor Goldstein (see my discussion of these ads above), and undo Professor Goldstein's changes by reverting back to the original coding of the students as revealed in the actual coding sheets, we find that these eight ads were aired a total of 2,405 times in the last 60 days of the [43(1 PCS/ER 00043)] 1998 election. According to the data, none of these ads used "magic words" and all mentioned candidates.

40 See Holman Deposition, page 89, line 15, through page 91, line 17.

Therefore, they are appropriate to add to the numerator of the above quantity, as in:

(836 + 2,405) / 5,064 = 64.0%

Thus, by this calculation, nearly two-thirds of the group ads that aired within 60 days of 1998 election were coded by the students as "genuine issue ads"; all of these (again in the words of the Brennan Center authors) would be "unfairly caught" by application of the criteria now set forth in BCRA.

CONCLUSIONS — *BUYING TIME 1998*

1. Careful examination of the Brennan Center/Professor Goldstein 1998 data provides little confidence that the data were collected and assembled accurately and reliably. For instance, the data provided for this analysis cannot reproduce the findings reported in the 1998 Report, and several obvious errors exist in the data base.

2. The methodology of coding the advertisement is deeply flawed.

3. The practice of engaging in idiosyncratic, standardless, and highly subjective post-hoc alteration of the data base by partisans severely undermines the credibility of the data set and the conclusions drawn therefrom.

4. The 1998 data provided by the Brennan Center/Professor Goldstein not only do not support the conclusions announced in the Report, but they in fact lead to exactly the opposite conclusion: The vast majority of ads broadcast within 60 days of the 1998 election, which depicted one candidate or the other, had as their primary focus issue advocacy. [44(1 PCS/ER 00044)]

Buying Time 2000

Summary of Conclusions about *Buying Time 2000*

- The data collected for *Buying Time 2000* are based on an improved methodology in which the authors clearly attempted to correct the

considerable deficiencies *of Buying Time 1998*. For example, it appears that, in contrast to the 1998 study, at least some systematic effort was made to assess the reliability of the 2000 data. Many methodological flaws were not corrected, however, rendering the 2000 data base susceptible to many if not most of the same criticisms that have been applied to the 1998 data base.

- No evidence is adduced in the 2000 project that
  - — the coding of the key variables is any less subjective than in the earlier study
  - — the process of post-hoc data alteration has been abandoned or constrained
  - — the biases so pervasive in *Buying Time 1998* have been made subservient to proper scientific procedures.
- Consequently, it should not be surprising that none of the multiple data bases provided by the Brennan Center and Professor Goldstein allow the figures and findings reported in *Buying Time 2000* to be reproduced.
- I adduce evidence that the *Buying Time 2000* data base produces such wildly divergent estimates of the number of airings with certain characteristics [45(1 PCS/ER 00045)] (such as issue ads that are aired within 60 days of the election and which depict a candidate), that the data cannot be used to provide useful conclusions about the characteristics of such ads and airings.

- As with the 1998 data, the most reliable finding that emerges from my analysis of the 2000 data is that most of the ads coded as promoting candidates in fact had "policy matters" as their "primary focus."

General Caveats and Reservations about ***Buying Time 2000***

Many of the problems I have already identified in *Buying Time 1998* also plague the 2000 edition of the data base, so I will mention them only in passing:

- This is not a peer reviewed study and has not been, and, in my professional judgment based on being a peer reviewer for publishers, journals, and research foundations, could not be, published as an academic report. Since *Buying Time 2000* has not been through a process of peer review, the study has not been subject to the close scrutiny of objective reviewers and its methodology has not been judged to be acceptable by the social scientific community.
- The authors appear to be proponents of a particular policy point-of-view rather than disinterested scientists.
- One of the authors of this report (McLoughlin) appears to have little if any training in the methods of quantitative analysis and the skill level of the other [46(1 PCS/ER 00046)] author (Holman), when it comes to analyzing data bases of this sort, is unclear.[41]

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41 There is the intimation in an e-mail on 09 Feb 2001 from Craig Holman to Ken Goldstein that Goldstein accused Holman of not understanding the database. Holman's e-mail reply to Goldstein defends against the charges laid by Goldstein. See 09 Feb 2001 e-mail from Craig Holman to Ken Goldstein (KG 00012853). A copy of the e-mail is attached as Exhibit 11 to this report.

- The data base has numerous errors and inconsistencies in it.
- The same ailments affecting the CMAG data base in 1998 continue to affect it in 2000, as for example the presence of missing data and the inability to capture each unique ad in its own storyboard.
- The analysis relies heavily on extremely subjective coding by students (at the University of Wisconsin), and the student coders were not trained in how to assess the ads.
- The data set is subject to continuous alteration by Professor Goldstein, in consultation with Brennan Center staff. No documents have been produced that indicate how Professor Goldstein has or should exercise his enormous discretionary powers to change or recode the data. On the basis of the data sets I have been provided by Professor Goldstein and the Brennan Center, I believe it likely that the data set as it exists today does not bear a strong relationship to the data coded by the students.

In sum, I conclude that one should not place any confidence in the data set or the conclusions drawn therefrom in *Buying Time 2000.* [47(1 PCS/ER 00047)]

The Data Provided for This Study

For the purposes of this report, I analyzed the following data set:

cmag_2000_labeled_data_may02_feb01_w_compet.sav.[42] This data set contains information on 970,428 airings. In general, the 2000 data are cleaner (fewer undocumented codes, internal consistencies, etc.) than the 1998 data, although (as documented later in this report), numerous errors still plague the data set.[43] Moreover, the processes by which errors in the data were identified and corrected are suspect and worrisome.[44] In the final analysis, one cannot

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42 The Brennan Center/Professor Goldstein provided multiple versions of the 2000 data base, including a file named: Final CMAG data - merged.sav . Despite its name, that file seems to be an earlier iteration of the 2000 data base. The file I am analyzing for this report has a creation date of 8/1/2002. I understand that it was produced by Professor Goldstein in this litigation. I have not examined the "new" 2000 data set included in Professor Goldstein's expert report of September 23, 2002, except to establish that it differs from the data set previously produced.

43 In an e-mail on 09 Feb 2001 from Craig Holman to Ken Goldstein, Holman identifies a significant error in a version of the data set transmitted from Goldstein to Holman. The error has to do with the transformation of a crucial variable. Holman asserts: "Q8New has been offered as a correction to Q8, but it is really a correction to Q 11, which is fine. However, the corrected version of Q11 by Q8New provides radically different results from the 1998 database." See 09 Feb 2001 E-mail from Craig Holman to Ken Goldstein (KG 00012853). This is one example of the sloppiness of the data base. A copy of this E-mail is attached as Exhibit 11 to this report.

44 A variety of data correction processes were apparently used, but none is detailed in the report, and at least some of the description of what happened raises serious methodological questions (e.g., missing values were determined by "extrapolating from other data" — *Buying Time 2000*, 20).

have much confidence in the validity and reliability of this version of the data base.

Replicating the Findings of *Buying Time 2000*

The numerous changes in the data base mean that many specific findings from *Buying* [48(1 PCS/ER 00048)] *Time 2000* cannot be replicated. This stems in part from a basic discrepancy in the number of airings considered to be group-sponsored. According to my analysis, there are 133,956 such airings. According to the table reported on page 72 of *Buying Time 2000*, however, there are at least 142,421 group-sponsored airings. I simply do not understand this discrepancy. Without basic agreement on the number of ads and airings, it is impossible to reproduce the findings of that report. Indeed, given the additional issue of *post hoc* alterations applied to the data base, it is unclear that the authors of the study themselves could stand by any given figure reported in *Buying Time 2000*.

Group Sponsored Ads in 2000

My focus in this report is on group-sponsored advertisements. Two variables in the data set apparently address the identity of the ad sponsor: SPONSORI and SPONSOR. Inconsistent codings exist in the data base on 125,084 airings, with the variable SPONSOR reporting these as "1. Candidate Sponsored Airings Including Primary" but SPONSORI coding them as "6. Unclear Primary Sponsor Airings." This discrepancy, however, does not seem to implicate group-sponsored airings and therefore can be ignored for present purposes.

For the purposes of this analysis, I focus on the 133,956 airings that are represented in the data base as being sponsored by interest groups in federal elections.[45] These airings were identified by a code of "1" on a variable named IGDUM. According to the ad identification [49(1 PCS/ER 00049)] variable (ADCODE), there are approximately 339 unique ads in this airings database. These ads are listed in Exhibit 12 to this report.[46]

The Reliability of the Coding

Unlike the 1998 data collection, it appears that the 2000 project made some serious attempt to assess the reliability of the data collected by the student coders. A great deal of information is still not available (e.g., how were the students recruited, to what degree had they been exposed to Professor Goldstein's courses and lectures), but *Buying Time 2000* does at least present some discussion of inter-coder reliability (e.g., *Buying Time 2000,* 19).

The most detailed explanation I have seen of the procedures undertaken to assess intercoder reliability is presented not in *Buying Time 2000* but in a 2002 report by Krasno and Goldstein.[47] Here we are told that a sample of

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45 These airings are identified in the data base by a code of "1. IG sponsored ads" on the variable IGDUM. Using the variable FEDERAL, I exclude 132 airings coded as "non-federal races." The titles of these ads are: MDCLT/Glendening Bell Overcharges, SC/NA Hodges Broken Promises, WVBC/Governor Underwood. Note that I included the 54,661 airings coded (implicitly) as missing data on this variable (FEDERAL).

46 All of the available storyboards for the ads listed are also included in Exhibit 12.

47 Krasno, Jonathan, and Kenneth Goldstein. 2002. The Facts about Television Advertising and the McCain-

250 ads was recoded, but no details are provided on how these ads were sampled (e.g., random versus non-random selection), who the coders were (e.g., expert versus novice), and variable-by-variable reliability results for the full ad coding data set are not presented. Before the inter-coder reliability methods can be accepted as producing any useful information, a great deal more information must be revealed.

In footnote 4 of this publication, Professors Krasno and Goldstein discuss the reliability of the coding of the "purpose" of the ad, asserting that the coders differed on the "purpose" of the ad in only a single instance. Although the report does not so indicate, the implication is that this [50(1 PCS/ER 00050)] variable was reliably recoded in 249 instances and disagreement appeared over only 1 single ad. The footnote also discusses the reliability of the question assessing the "tone" of the ad. No other variables are discussed. It appears from this footnote, however, that Professors Krasno and Goldstein place considerable confidence in the coding judgments of their student coders.

Another Data Set in Constant Flux

As I noted at the outset of this section, this data set, like the 1998 data, is continuously being changed. Specifically, I mean that the original codings assigned to the ads and airings by the students are altered with some regularity by Professor Goldstein.

Over the life of the data set, practices and policies in this regard have varied. For example, in an e-mail from Craig Holman (Brennan Center) to Ken Goldstein dated 03/10/2001, Dr. Holman makes the following assertion:

> At our last conference call, the staff decided that we are on more solid ground not

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Feingold Bill." *PS: Political Science and Politics* 35 (#2, June): 207-212, in footnote 4, page 211. See Exhibit 5.

> substituting our own judgment of the ads for the undergrad coder's judgments, except in the case of clearly factual errors, so I am reconverting a couple of key variables back to the original codes on q11. [the "purpose" of the ad variable][48]

Dr. Holman refers to ADCODE 1367 as an example of this decision.

The data base also provides some information about the alterations of the original data set. Consider the coding of Question 11 (the so-called purpose of the ad). In the 8/01/2002 version of the data base, there is a variable named Q11. This, I initially assumed, is the original [51(1 PCS/ER 00051)] coding of the students for the crucially important indicator of the purpose of the ad. I assumed this in part because the variable is in sequence in the data set with the other variables derived from the original coding of the ads. However, three additional variables exist, named OLDQ11, Q11.1, and NEWQ11. The variable OLDQ11 has different numerical codes for the categories, but is identical to Q11.1. Similarly, Q11 and NEWQ11 are identical.[49]

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48 See 03/10/2001 E-Mail from Craig Holman to Ken Goldstein, Holman Deposition Exhibit #23. A copy of the E-mail is attached as Exhibit 13 to this report.

49 There are actually a number of variables in the data set characterizing the ad. Though differences may exist outside the group-sponsored portion of the total data base, in the 133,956 airings considered in this report, the following variables are equivalent:

Q11 =NEWISSUE
Q11 =NEWELEC
Q11_1 = OLDISSUE
Q11_1 =NEWISSUE

My analysis suggests that the original coding of the ads on this attribute is most likely to be found in Q11_1.[50] I identify this variable because it contains the full range of codes, including unsure and missing data codes. The variable Q11_1 was apparently first transformed into the Q11 (which was then inserted in the sequential order that Q11_1 once occupied). One difference between the two variables is that Q11 has no missing data. How the problem of no information for the ads/airings was resolved is not apparent from the data set.

The data base contains 338 ads.[51] Of these, 276 are coded consistently throughout the various versions of this variable. That is 181 ads (and these are ads, not airings) were coded as designed to generate support or opposition to candidates and were not later altered by Professor [52(1 PCS/ER 00052)] Goldstein. Similarly, 95 ads were coded by the students as advocating issue positions and these codes were then apparently accepted by Professor Goldstein.

The codes for the remaining 62 ads appear from the data base to have had their codes changed on the "purpose of the ad." These findings thus bring an entirely new perspective to the 2000 Buying Time data base. It is certainly true that the original ad data were coded by the student coders. But it is apparent that a substantial number of these codes - 62 ads out

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50 There is yet another representation of the ad's purpose in the data set in the variable ADCODE. The differences between this variable and Q 11 are on four ads that are coded as electioneering on Q 11 but as genuine issue ads on ADTYPE. Being unable to discern why these changes were made, I will use Q 11 as the indicator of the ad's "purpose" throughout this report.

51 Actually, there are 339 ads, but one ad is not consistently coded on Q11 so I excluded it from this analysis.

of a total of 338 — apparently were not the product of the student coders but were instead based on the judgment of Professor Goldstein (often with the consultation of the staff of the Brennan Center). Unfortunately, very little information has been reported regarding what limits, if any, were placed on Professor Goldstein's discretion in making these changes, information which is highly important for assessing the findings of the 2000 Report.

Let us return to the inter-coder reliability results reported for this variable by Professors Krasno and Goldstein. It now appears that changes in the codes for Question 11 were fairly common. One wonders therefore whether the inter-coder reliability results discussed in the report in *PS* reflect a comparison between the subsequent codings for the reliability test and (a) the original coding by the students or (b) the Goldstein-adjusted version of the variable. These data present a puzzle: Given that the student coding was deemed after the inter-coder reliability test to be so reliable for Question 11, why were so many changes subsequently made by Professor Goldstein in the codings of these variables? Were *reliable* student codings altered by Professor Goldstein? If so, on what basis and with what justification? Since it is difficult for me to imagine that one would conduct an inter-coder reliability test on data that had subsequently been altered by the investigator — such a test would obviously not provide evidence of the reliability of the [53(1 PCS/ER 00053)] *student* coding — I can only imagine that Professor Goldstein decided to alter the data base insofar as Question 11 is concerned *even after drawing the conclusion that the coding of the ads on Question 11 was reliable.* Whatever specifically happened with these data, the conclusion I am compelled to draw is that the data as presented in the data set cmag 2000_ labeled_data_may02_feb01_w_compet.sav are of highly questionable reliability.

Two important concerns arise from this examination of the volatility in the coding of the ads.

1) What motives were involved in making the various changes to the codes for these ads? Were the changes solely a function of scientific concern for accuracy in the data, or were they instead related to disappointment that the initial findings did not support the expectations and preferences of the investigators?[52]

2) What specific standards did Professor Goldstein employ in judging the ads? Apparently, no documents exist that formalize and make explicit his decision rules and heuristics. Indeed, it is unclear to me that a specific formal definition has ever been provided for an ad that has as its purpose the generation of "support or opposition for a candidate" or for an advertisement that "provides information or urges action." Further, how should an ad that undeniably does both be coded? The investigators have asserted numerous times that subjective [54(1 PCS/ER 00054)] judgments are involved in coding Question 11. Presumably, some specific decisional heuristics exist to guide these judgments. Unfortunately, none has been produced, insofar as I am aware.

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52 One sees evidence throughout the e-mail exchanges of the investigators of a clear preference that the data support a particular conclusion. For instance, in an e-mail of 11 Jan 2001 from Dr. Holman to various NYU people, Dr. Holman (referring to the 1998 data) asserts that "the numbers crunched for Rick do not paint as great a picture as previously thought." After summarizing his view that the number of issue ads in 1998 that would be deemed "electioneering within a 60-day regulatory period" is more likely 40% than the originally claimed 7%, Dr. Holman asserts: "Hopefully, we will get more positive results from the 2000 database." A copy of this E-mail is attached as Exhibit 14 to this report.

Additional Considerations Regarding the Coding of Question 11

One of the most important variables in the 2000 study is Question 11. The student coders were asked to respond to the following query *(Buying Time 2000,* 99)*:*

> 11. In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Generate support or opposition for a candidate
>
> 2. Provide information or urge action
>
> 3. Unsure/Unclear

Thus, the wording of the question in the *1998* and 2000 projects is identical.[53]

Consequently, the coding of this variable contains all of the frailties of the *1998* coding. Without repeating my conclusions from my review of the 1998 data, I will simply summarize my concerns about the data collected with this question:

- The coders are asked to make a judgment about the "purpose" of the ads from the manifest content of the ad. Of course, no data are available on the "purpose" of the ads' sponsors so the student coders are obviously therefore not coding anything about the intention of the ad sponsor. [55(1 PCS/ER 00055)]

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53 In 1998, the words "particular candidate" were printed in bold-face type; in *Buying Time 2000* the words were printed in ordinary type.

- The question is highly subjective, and it is not clear that any rules or guidelines were provided to the coders to guide the exercise of discretion. What constitutes "support" or "opposition" is nowhere detailed for the coders, requiring them to rely on their own subjective values in the exercise of their discretion in answering this question.
- The question is difficult to answer, requiring a great deal of information, including knowing whether someone depicted in the ad is in fact a candidate in the geographical area where the ad was aired.
- The question requires a forced choice of either providing information/urging action or generating support/opposition for a particular candidate, thus failing to recognize that many ads may have mixed content.
- In the event of mixed content ads, the question provides no instructions for how to weight the various parts of the ad in drawing a conclusion about its "purpose."

Thus, this analysis reinforces my deep and serious reservations about the quality of the data collected with this question.

The Issue Content of Candidate Support Ads

I have adduced in this report indirect logical and empirical evidence indicating that the student coders over-reacted to the appearance of a politician in these ads, often falsely coding [56(1 PCS/ER 00056)] issue advocacy ads as electioneering ads.[54] But it is unnecessary to rely on indirect

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54 As I have suggested earlier, many of the alterations in the data base were necessary because the student coders over-

evidence or conjecture in investigating these ads; instead, direct evidence as to their issue content is available from the data base itself.

In 2000, the student coders were required to answer the following question:

> 27. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Policy matters
> 2. Personal characteristics
> 3. Both
> 4. Neither

The question is superior (i.e., more likely to generate valid data) to Question 11 in at least two important respects. First, it allows ads to be coded as having mixed content. Second, it provides guidance to the coders, however vague, by asking them to judge the "primary focus" of the ad. This renders the coding of mixed content ads more reliable and valid.

Recall that 79,648 of the group-sponsored airings (59.5% of the total) were coded on Question 11 as having as their purpose the generation of support or opposition to a particular candidate.[55] The following table reports the coding on Question 27 of the 79,648 airings said to be electioneering ads in Question 11. [57(1 PCS/ER 00057)]

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reacted to the presence of a political figure in an ad, often wrongly assuming that if a political figure appeared, he or she was a candidate for public office, and that the ad were therefore highly likely to be engaged in electioneering.

55 For the purposes of this analysis, I use variable Q 11, which I believe to be the Goldstein adjusted version of the original codings.

Coding on Question 27 – Primary Focus of the Ad	Airings Coded as Having the Purpose of *Generating Support or Opposition for a Candidate*	
	Number of Airings	Percentage
Policy Matters	62,764	78.8
Personal Characteristics	1,956	2.5
Both	14,035	17.6
Neither	379	0.5
Missing/not coded	514	0.6
Total	79,648	100.0%

Thus — and this is a very important conclusion — 78.8% of the ads coded as having "electioneering" purpose in Question 11 were simultaneously coded as having as their "primary focus" advocacy on "policy matters." Another 17.6 % of the airings had both policy and personal characteristics as their foci, *resulting in a total of 96.4% of the group-sponsored ads in 2000 having policy matters as their primary focus, or at least as part of their primary focus.*

As with the 1998 data, it is obvious that the coding of Question 27 highlights the deficiencies of the coding of Question 11. Indeed, the results I produce are entirely logical given the artificial nature of the coding decision required by Question 11. Question 11 produces the results it produces because (a) the coders failed to code mixed content ads, since Professor Goldstein provided them no coding category with which they could record mixed-content ads, and (b) they also over-reacted to the presence of politicians in the ads when they coded Question 11. Thus, their coding on Question 11 vastly underestimated the number of ads with policy [58(1 PCS/ER 00058)] content. When given a chance on Question 27 to acknowledge that ads might have mixed content, the coders overwhelmingly judged that these ads focused

primarily on issues. To reiterate, due to the defects in the structure of Question 11, and the much sounder structure of the question asked in Question 27, the results of Question 27 should be accepted because the coding is both more reliable and more valid.

Exactly what is the issue content of these ads? In Questions 32 - 35, the student coders identified the specific policy issues addressed in the ads.[56] Fully 37.8% of the ads coded as electioneering addressed issues of "Health Care" and another 25.8% considered "Medicare."[57] A panoply of additional issues is addressed in these ads, clearly attesting to their issue content.

The Characteristics of Group-sponsored Issue Ads Aired Within 60 Days of the Election, 2000

Two variables become relevant when we consider ads and airings within 60 days of the 2000 election[58]: (1) The presence of "magic words" — the indicator of the presence of "magic words" is derived from the responses to Question 8[59], and (2) whether a candidate is mentioned [59(1 PCS/ER

56 There is an apparent error in some of the coding, since the undocumented code "9" appears in 514 of the airings.

57 Note that "Health Care" and "Medicare" are independent and separate categories in the data base.

58 There are 225 airings with a missing value on the variable SPOTDATE (date on which the airing was aired). It is not clear from the available documentation how these missing values were corrected to produce scores on the variable DAY60.

59 Note that, according to Dr. Holman, this is not an objective variable; instead, the coding of this variable is subjective. Holman Deposition, page 72, lines 4-6. See Exhibit 8.

00059)] in the advertisement. Because it appears that this information was subject to considerable *post hoc* coding by Professor Goldstein, I merely accept for the purposes of this analysis the coding in the data set for the variable MENTION[60]:

Some 60,000 airings in 2000 satisfy these three criteria (aired within 60 days of the election, no "magic words," and a candidate for office was apparently mentioned or depicted). According to the data base (and without accepting the results), in the overwhelming majority of these airings — indeed, 59,997 out of 60,006 - the "purpose" of the ad was to generate support or opposition for a candidate.

On the other hand, consider how these ads were coded on Question 27:

Q27	Number of Airings	Percentage
Primary focus on policy matters	47,356	78.9
Primary focus on personal characteristics	541	0.9
Primary focus on both	11,884	19.8
Primary focus on neither	225	0.4
missing/not coded	0	0.0
Total	60,006	100.0%

Thus, the overwhelming conclusion is that, of the airings with these three characteristics, 78.9% were coded by the students or Professor Goldstein as having policy matters as their "primary focus" and another 19.8% were said to have *both* policy matters and personal characteristics as [60(1

60 There is some inconsistency between this variable and the coding on Questions 12 and 13. The causes of this inconsistency are not apparent to me, suggesting that it is due to Professor Goldstein's adjustments on the data base.

PCS/ER 00060)] their primary foci. *Thus, 98.7% of these ads in fact have a clear policy focus.*

An example of the coding of one of the ads might be useful to document how this coding works in actual practice. Consider ad # 1544, which reads:

> [Woman]: "Many people who have cancer are looking for miracles. At this point, it's my faith, my support from my family and my friends. And then there's the medicine."
> [Announcer]: Congresswoman Anne Northup is working to add a prescription drug benefit to Medicare and make sure medicines are available for every senior who need them. Call Congresswoman Anne Northup.
> [Woman]: "Without the medicine, I would not be where I am." [PFB Citizens for Better Medicare Inc.]

Frame #7 reads:

> Call Cong. Northup
>
> Support her Rx Plan for Seniors
>
> (502) 582-5129
>
> PAID FOR BY CITIZENS FOR BETTER MEDICARE INC.

This ad was coded as promoting a candidate (although this is itself a highly questionable assessment). But the ad was also coded as having policy matters as its primary focus, and was also properly coded as to the policy substance ("Medicare"). Surely the coders judged the "purpose" of this ad to be candidate promotion because they over-reacted to the mentioning of a candidate and because they were not allowed to code such ads as having mixed content. In this and many other instances, the coding of Question 27 regarding the primary focus of the ad is more reliable and valid than the

coding of Question 11 (the "purpose" of the ad). [61(1 PCS/ER 00061)]

According to the data base, nearly all of these ads in 2000 were coded as "electioneering issue ads." But according to my analysis nearly all are primarily focused on issues. Which of the two conclusions should be accepted and believed?

To answer this question requires that we return to the relative value of the coding of Questions 11 and 27. I need not repeat the arguments nor reproduce the data analysis I presented above. The simple conclusion is that when the codings on Questions 11 and 27 seem to indicate different content in an ad, the results from Question 27 ought to be accepted due to the greater reliability and validity of the coding on Question 27.

Ads Aired Within 60 Days of the 2000 Election

Buying Time 2000 asserts: "Of all group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads (see Figure 8-2). In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications under the Snowe-Jeffords amendment*" *(Buying Time 2000,* page 73, emphasis in the original). From a statistical viewpoint, this conclusion ought to be fairly easy to reproduce from the version of the 2000 data base with a creation date of 8/1/2002 (the data base I have been analyzing for this report). In order to avoid any confusion, I will focus on a single number in this claim: 331, the number of airings represented by ads with these characteristics.

According to the data base, if this question is addressed with the coding on Question 11, *there are 9 airings with these characteristics.* Not even the authors of *Buying Time 2000* believe that this is a correct estimate of the number of airings. [62(1 PCS/ER 00062)]

According to the coding of Q11_1 (which I believe to be the original, student coded version of the "purpose" question), there are 1,082 airings with these characteristics. Thus, there are at least three possible answers to the question of how many ads were aired within 60 days of the election which depicted candidates and which had as their purpose providing information:

9 airings

331 airings, or

1,082 airings.

I have no doubt whatsoever that many additional estimates could be produced from the *Buying Time 2000* data base. In fact, however, I have confidence in none of these.

Just as important as the accuracy or inaccuracy of the data cited in the 2000 Report, however, is the extent to which changes in a relatively small number of the highly subjective codings can affect the results reported and the conclusions reached. To make this point, let us consider 30 specific ads from the 2000 data base. These ads are:

676, 704, 1270, 1367, 1381, 1422, 1552, 1648, 1757, 1761, 1844, 2065, 2088, 2089, 2107, 2158, 2301, 2344, 2502, 2558, 2588, 2695, 2712, 2810, 2900, 2935, 3158, 3170, 3220, 4001.[61] Let us assume for the purposes of this analysis that each of these ads could fairly be coded as "providing information."

When I examine the number of airings of these ads within 60 days of the election,[62] I discover that they were

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61 This list of 30 ads was provided to me by counsel. The storyboards for these 30 ads are attached as Exhibit 15 to this report.

62 Note that none of these ads uses "magic words;" all mention candidates.

aired 14,133 times. The total number of genuine issue airings under this [63(1 PCS/ER 00063)] hypothesis is therefore the 331 acknowledged by the Brennan Center report and these 14,133, for a total of 14,464 airings. Since there were 60,006 issue airings (without "magic words") within 60 days of the 2000 election, this figure of 14,464 constitutes 24.1% of these airings. Thus, if one assumed that airings presented within 60 days of the 2000 election, which mentioned candidates, but which did not mention "magic words," were intended to promote candidates (or were, in the words of the Brennan Center authors, "electioneering ads"), one would be wrong, under this scenario, approximately 24% of the time.

Several conclusions should be drawn from this analysis. First, changes in the coding of very small numbers of ads can change the results dramatically. Second, the current version of the 2000 data base supports many possible estimates of the number of ads with these characteristics. And finally, given all of the deficiencies of the data base and the coding on which it is based, the wisest course is to draw no conclusions whatsoever about these ads on the basis of the empirical evidence in the data base.

Summary and Conclusions

One important conclusion from this analysis is that there is a great deal of subjectivity, ambiguity, and ambivalence in the coding of the content of these advertisements. The student coders often disagree with Professor Goldstein, Professor Goldstein occasionally disagrees with the staff of the Brennan Center, and indeed, Professor Goldstein himself seems to change his mind over time about the nature of some of these ads. Whether an ad is issue based or candidate focused is not an objective, clearly discernible attribute of the ads. Reasonable people disagree about the content of these ads. [64(1 PCS/ER 00064)]

Consequently, this data base is constantly in flux. The figures reported in *Buying Time 2000* have changed with alterations and manipulations of the data by Professor Goldstein and it is entirely possible they will change again in the future. Since no reports have been written about this process of data manipulation, there has been no transparency in this process. Since this research has not been subject to the peer review process — through which such procedures would have to be revealed, defended, and accepted by the academic community — one cannot help but worry quite a bit about the reliability and validity of the data collected. Without reliability and validity, no useful conclusions can be drawn from the data base.

This entire research process in *Buying Time 2000* thus deviates in many important ways from conventional scientific research. One cannot help but be impressed by the e-mail correspondence among the analysts. The conclusion one draws from a review of this e-mail is that the investigators were committed to drawing a particular set of substantive conclusions from the data. When the conclusions were not forthcoming, the data were scrutinized further and alterations were made in the data base. Indeed, at least with regard to some of the conclusions of the *Buying Time 1998,* internal disagreement among the investigators themselves about the veracity of the findings appears to have been substantial. Such strong *a priori* commitments to drawing certain substantive conclusions from the data base seriously undermine the credibility of the reports. [65(1 PCS/ER 00065)]

OVERALL CONCLUSIONS

The essence of science is replication. When scientists claimed to have discovered "cold fusion" excitement spread quickly throughout the world. That excitement dimmed and then was extinguished when it was discovered that crucial experiments could not be reproduced. Unless research procedures can be explained in such a way that others can

repeat the procedures and produce the same results, then no value attaches to the information produced. We do not believe that cold fusion can be accomplished today because the initial claims of the investigators cannot be reproduced by others.

The Buying Time reports are not of the potential significance of cold fusion for the advancement of human welfare, but the reports do share the fatal flaw of relying on data that are not capable of generating reproducible findings and conclusions. For example, what proportion of issue ads in 1998 would have been improperly regulated or banned were a bright-line test imposed? *Buying Time 1998* says 7 percent; the depositions point to several figures between 13 and 40 percent; and my own analysis of the "final" 1998 data produces a figure of between 82 and 89% (based on the coding in Question 22). Similar ambiguity and ambivalence characterize the 2000 data.

Why is there so much disagreement about the correct statistics? Part of the answer resides in factors such as the sloppiness of the data base and the fact that published reports did not undergo a review process prior to publication. But the larger portion of the answer has to do with the inherently subjective nature of the coding process. Certainly neither the coders nor Professor Goldstein could have accurately coded the "purpose" of any of the ads since no effort whatsoever was made to investigate the intent of the ad sponsors. The coding of the content of the ads is [66(1 PCS/ER 00066)] inherently a subjective process — and proper scientific procedures for dealing with subjective phenomena were not followed — but subjectivity and coder discretion were exacerbated by failure to formally constrain and guide the exercise of discretion (including the exercise of discretion by Professor Goldstein) and by the inadequacies of the coding form itself (e.g., the failure to allow coders to acknowledge that ads typically have more than a single focus). And to allow coding decisions to be reversed on an idiosyncratic

basis by those with a strong policy interest in the outcome of the research violates all canons of scientific objectivity. It is little wonder that the findings of *Buying Time 1998 and Buying Time 2000* concerning so-called sham issue advocacy were not published in peer-reviewed social scientific journals or monographs.

After reviewing the reports, the data, and the depositions, I conclude that the findings of these reports should not be accepted as accurate and valid descriptions of the nature of political advertising in the 1998 and 2000 federal elections. The Buying Time reports have not taught us much about sham issue advocacy but they have been instructive on the nature of sham science.

Dr. James L. Gibson
September 30, 2002

[1(2 PCS/ER 00794)]

Rebuttal to the Expert Reports of

Kenneth M. Goldstein and

Jonathan S. Krasno and Frank J. Sorauf

Dr. James L. Gibson

October 7, 2002

In my review of the original Buying Time reports (1998 and 2000), I drew several major conclusions about the reports, their conclusions, and the data upon which the studies were based. It is perhaps useful to begin this rebuttal with a brief restatement of these conclusions.

- As provided by Professor Goldstein, the 1998 and 2000 data bases are riddled with errors and inconsistencies and the findings of the reports cannot be replicated from the data.

- The key measures that are the focus of this litigation require highly subjective assessments and the student coders making those judgments never received any instruction on how to exercise their enormous discretion.

- The data bases are constantly being manipulated by Professor Goldstein, with many iterations of new scores being produced for the variables of primary interest in this litigation.

- Thus, the conclusions from those reports should not be accepted.

- Indeed, to the extent that the data bases are able to support any [2(2 PCS/ER 00795)] conclusions, they are that the ads under consideration in this litigation have policy matters as their primary

> focus and therefore to ban or regulate them would be a substantial intrusion upon the freedom of interest groups to communicate with citizens and to attempt to shape public policy.

I will focus this rebuttal to the expert reports around the question of whether my conclusions are altered by the reports or the new data analysis that underlies them. I conclude that nothing in these reports has caused me to change the conclusions I expressed in my report of 9/30/2002.[1] Since nearly all of these issues are common to both the 1998 and 2000 studies, I will generally integrate my discussion of these studies in the analysis that follows.

Repudiating the Results from *Buying Time 1998* and *Buying Time 2000*

These new reports make plain that the authors and I agree on one basic point: The statistical analyses presented in *Buying Time 1998* and *Buying Time 2000* should not be accepted. Professor Goldstein now reports entirely new estimates of the effect of the Bipartisan Campaign Reform Act (BCRA) on "genuine issue speech,"[2] thereby repudiating the figures reported in *Buying Time 2000*, and Dr. Krasno and Professor Sorauf report new estimates for 1998 that differ from the numbers reported in *Buying Time 1998*.

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1 A listing of additional materials upon which I have relied is attached as Exhibit 1.

2 To assist readers in comparing my analysis with that of Goldstein/Krasno/Sorauf, I adopt some of their language (e.g., "genuine issue ads"). The use of these terms should not be taken to represent agreement with either the conceptualization or operationalization of these concepts and issues, but is instead simply a convention I adopt so as to facilitate communication.

The same conclusion applies to the data bases. Professor Goldstein has provided with his [3(2 PCS/ER 00796)] expert report yet another version of the 2000 data base, so presumably the earlier versions are defunct and should not be relied upon. Dr. Krasno and Professor Sorauf do not provide a newer version of the 1998 data base, but do offer calculations in the appendix that apparently render the old data base obsolete. I assume that one day these data bases will be archived and made available for use by other interested scholars, as most data bases of this sort are, and that at that point the authors will create clean, properly documented, and final versions of the data bases.[3] That day has not yet arrived.

As I have noted, the Buying Time data and studies are constantly evolving (with changes apparently being made in the codes of airings even in connection with this litigation), and with the conclusions of the authors representing targets that are always on the move. But at the same time, details about the methods employed by the studies are slowly beginning to emerge. Let us consider first the basic question of the quality of the data collected by CMAG.

Errors in the CMAG Data

The data collected by Campaign Media Analysis Group (CMAG) deserve closer scrutiny than they have received to date. Professor Goldstein professes confidence in these data,[4] but considerable empirical evidence exists to suggest that this confidence is misplaced.

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3 While Appendix F of Professor Goldstein's report provides a document entitled "2000 Coding Sheet," this document provides information on only a tiny fraction of the variables included in the data set.

4 See Ridout, Travis N., Michael Franz, Kenneth Goldstein, and Paul Freedman. 2002. "Measuring Exposure to

The CMAG data base should be scrutinized from several vantage points: [4(2 PCS/ER 00797)]

1) Were all of the airings represented in the data base in fact aired?

2) Does the data base represent all ads aired or instead were some airings not captured by the CMAG technology?

3) Did the CMAG "analysts" accurately code the content of the ads?

4) Was CMAG in fact able to capture storyboards for every unique ad?

Unfortunately, the answers to some of these questions cast very serious doubt on the CMAG data.

I have access to no independent information with which I can verify that the airings represented in the CMAG data base were actually broadcast, or that the information captured is in fact accurate.[5] However, Professor Goldstein has presented some evidence in his paper entitled "Measuring Exposure to Campaign Advertising" indicating that the accuracy of the information collected is certainly less than perfect (see Ridout et al. 2002).[6]

Campaign Advertising." Unpublished paper, June 19, 2002, at page 17.

5 In the appendix to their expert report, Dr. Krasno and Professor Sorauf claim that the CMAG data base is incorrect in the information it depicts about the ad with the id number 13. They provide no explanation for the error in the data base. Unfortunately, the appendix is not paginated, but this seems to be the 15th page of text in the appendix.

6 Counsel for the AFL-CIO has provided me a copy of the Declaration of Denise Mitchell, 10/4/2002. In her

An equally serious issue is whether the data base fails to capture all ads that are broadcast. The available evidence suggests that there are some very serious omissions. [5(2 PCS/ER 00798)]

Professor Goldstein has reported that he compared the information in the CMAG data base with the actual billing records of eight television stations in five different markets (see Ridout et al. 2002). He discovered that the error rate of the CMAG data varied from 0 to 20 % (see Table 2, page 28).[7] From the figures reported in Table 2, we can derive an estimate of the overall degree of accuracy of the CMAG data base.

Note first that station billing invoices appear to document more ads than found in the data base in every one

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Declaration, Mitchell asserts that she cannot reproduce from AFL-CIO records Professor Goldstein's calculations from the data base on the airings sponsored by the AFL-CIO. She notes that the CMAG data base makes two types of errors: errors of omission (failure to include ads aired by the AFL-CIO) and errors of commission (the inclusion of ads said to be aired by the AFL-CIO but that were in fact not aired). Since the AFL-CIO is the group with the second largest number of airings in the data base (well behind the Citizens for Better Medicare), any such failure to track accurately the airings of this organization would be a major indictment of the quality of the data base. See Declaration of Denise Mitchell, 10/4/2002, paragraph 64.

7 Working through the example Professor Goldstein provides in the paper is useful for understanding the meaning of the error rate. The error rate for station WJRT is .01. This means that of the 618 airings for which the station has billing records, the CMAG data base includes only 612. Thus the error rate is .01: ((618 - 612) / 618) = .01.

of the stations examined. Thus, the CMAG data always under-represent the number of airings by each of these television stations.

By how much does the data base under-represent actual broadcasts in 2000? We can derive an estimate quite simply. For instance, the 8,526 airings in the data base for WJRT apparently represent 99 percent[8] of the actual airings broadcast by WJRT. Applying the arithmetic, this means that WJRT probably broadcast 8,612 spots, and that the CMAG methodology therefore failed to capture 86 of these.[9] Applying this methodology to the figures for each of the stations, we discover that the CMAG data for these 8 stations likely missed 1,764 ads.[10] This represents a small percentage of the overall airings of these eight stations (5.04%), [6(2 PCS/ER 00799)] but when this proportion is applied to the data base as a whole, it translates into an estimate of 48,864 airings that in fact were broadcast but that were not captured by the CMAG methodology. This is a sizable number indeed. Moreover, the number is of sufficient magnitude that failure to include these airings in the analysis most likely biases the substantive conclusions drawn from the data base.

We do not know any of the characteristics of these 48,864 missing airings. But one might reasonably hypothesize that the clearer and more obvious the political content of an airing, the more likely it is to have been

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8 This figure is equal to 100% minus the error rate.

9 (8,526/8,612) = .99.

10 Were I to use the more demanding standard of "Percent correct within 1 sec." (the first data column in the table), the number of ads estimated to be missing or that contain serious errors would be significantly higher than the numbers I report here.

included by the CMAG analyst. Conversely, to the extent that ads did not have a clear "political purpose" that could be discerned by the CMAG analysts, the more likely they were to have been excluded from the data base by the analysts. Thus, it seems reasonable to assume that these 48,864 missing airings are not simply a random sub-set of the data, but instead tend to include a disproportionate number of "genuine issue ads."

Having addressed the "errors of omission" in the CMAG data base, I now consider the evidence on "errors of commission." In footnote 4 (page 17) of the Ridout et al. paper, the authors note an important anomaly in the CMAG data base: ".... some advertisements .... were never coded in the original data set [the student codings of the ads]. This is because these ads were not political, but were nonetheless included in the data provided by CMAG." This sentence raises a host of questions about the data base, including: What criteria did CMAG employ for selecting ads to be included in the data base? How was the content of the ads (e.g., "political" versus not) coded, and by whom, according to what criteria, and with what degree of reliability? Perhaps this problem with the CMAG data accounts for some basic puzzles and discrepancies in the data base. [7(2 PCS/ER 00800)]

Finally, I return to the inability of the CMAG technology to capture text and storyboards for each unique ad. Because the technology cannot distinguish airings that are very similar but not identical, so-called cookie-cutter ads are not properly represented in the data base. The failure to capture all airings of all unique ads is a very serious limitation of the data base.

In conclusion, the CMAG data are apparently plagued by numerous errors, making reliance on these data bases for drawing conclusions about the nature of political communications in the United States extremely precarious, hazardous, and subject to error.

The Evolution of Question 11

The second portion of the data bases used for these two reports was created by the student coders at Arizona State University and the University of Wisconsin. In the 2000 data set, Professor Goldstein provides yet another incarnation of the ad's scores on the all-important Question 11.[11] In the 2000 data set appended as Appendix L to his expert report, an entirely new variable can be found. This variable was not present in any of the earlier versions of the data base previously provided by either Professor Goldstein or the Brennan Center. The name and label of this variable are:

BT00_Q11 oldest available q11 codes (older than feb version) This variable is of considerable interest given the importance of Question 11 to the findings and conclusions of Professor Goldstein's expert report. Where it came from, what it means (the [8(2 PCS/ER 00801)] individual response codes on the variable, ranging from 0 to 99, are unlabelled[12]), how it was match/merged to this data set, and indeed whether it is in fact the "oldest available" incarnation of Q11 all

11 I will not repeat all of the objections I laid out in my report of 9/30/2002, but I do incorporate those objections into this analysis since I have not changed my views on any of the issues addressed in that report.

12 Data sets are typically documented with a "codebook" that details the meaning of each variable and each code on each variable in the data set. Moreover, to facilitate understanding and avoid analytical errors, variables are typically fully documented with labels. This variable is labeled as to its possible content (e.g., "oldest available q11 codes (older than feb version)"), but the individual scores or codes (what we would call the "response set") are not documented. No codebook was provided with this data set, and the norm in the data set is for the variables to be entirely undocumented.

remain open questions. I assume that this variable gets closer to representing the original codes assigned to the ads by the student coders at the University of Wisconsin. I do not know if in fact some earlier version of this variable exists.[13]

Many issues surround the coding of Question 11 by the students and by Professor Goldstein. Since new information about this variable has come to light in Professor Goldstein's expert report, how this information about the ads was created deserves some additional scrutiny.

Inter-coder Reliability. In my report of 9/30/2002, I offered an analysis of both the reliability and validity of the information collected by the students. I surmised in that report that no formal test of inter-coder reliability was conducted in 1998. Nothing in the new expert reports leads me to a different conclusion about the 1998 data.

However, new information does indeed emerge about the 2000 data. In Appendix I to his expert report, Professor Goldstein offers a copy of a paper currently under review at *Political Communication*. In this paper, consideration of the reliability of the variables is presented, beginning on page 17 and extending through page 21. Here, the author reports an analysis of "the [9(2 PCS/ER 00802)] accuracy of the human coding" (page 17), based on a randomly selected sample of "150 unique advertisements from the over 4,000 advertisements airing in 2000" (page 17).[14] Goldstein asserts: "As part of a larger project, we asked five undergraduate students to code the ads using our coding

13 I have confirmed that this variable differs from the variables Q11 and Q11_1 as represented in the data set: cmag_2000_labeled_data_may02_feb01_w_compet.sav.

14 It is not clear how this sample of 150 ads relates to the 250 ads discussed in footnote 4 of the Krasno/Goldstein PS report (published in June 2002).

sheet, thus allowing us to compare our original coding with five independent assessments. We then compared each coder's results with those of the CMAG data base" (pages 17-18). Several questions about this process emerge.

One first wonders about how Professor Goldstein compared the new codings to the "original coding." Is the original coding represented in the variable "BT00_Q11 oldest available q11 codes (older than feb version)"? If so, why is this variable referred to as the "oldest available" incarnation of the coding rather than the "original version" of the variable? This a most troubling discrepancy, unless BT00_Q11 purports to be the scores assigned to the ads by the students and before the various post-coding manipulations and changes by Professor Goldstein.

This "test" of the accuracy of the coding relies upon 143 advertisements (since some of the 150 selected had to be discarded due to the discrepancies in the CMAG data base). In order to establish the relevance of this test to the issues in this litigation some considerable attention must be given to this sample of 143 airings.

Consider the 2000 data base and the coding of Question 11 in the version represented by BT00_Q11. Once four pesky airings are removed from the data base, 970,424 airings remain.[15] [10(2 PCS/ER 00803)] When aggregated by the ad identification number, this produces 3,111 unique ads (or ads found to be unique by virtue of their ad

15 Professor Goldstein asserts on page 8 of his report that "the CMAG database collected 970,424 political television ad broadcasts ....". Yet the data base he attaches as an appendix to his report includes 970,428 airings. I removed the four airings with a "system missing" score on the variable named COUNT. This produces a data base with a number of airings consistent with the number identified in Professor Goldstein's report.

identification number, to be absolutely precise).[16] Of these airings, 2 seemed to have been coded differently at different times (i.e., for different airings) on the "earliest known" Question 11. Furthermore, the student coders assigned what are apparently missing data scores to 19 of the ads.[17] Of the remaining ads, 2,953 were said to be "electioneering" ads (promoting support or opposition for a candidate) and only 127 ads were scored as providing information or [11(2 PCS/ER 00804)] urging actions ("genuine issue ads").

This distribution on the "purpose" variable has two very important consequences. First, in statistics, we call this a "skewed" distribution since almost all of the cases are scored in a particular way (and in the sense that deviation from a 50/50 split is extreme). When a variable is highly skewed, as this one, sampling cases on this variable becomes very difficult. A randomly selected sample of 100 ads from this "population" of 3,111 would be expected to find only 4 ads (actually 4.1 ads) that were coded as issue ads. A sample of 150 ads would be expected to generate 6 issue ads; and a sample of 250 would be expected to include no more than 10 issue ads. Thus, if one took a sample of 150 ads as Professor Goldstein asserts in his paper, one would find only a tiny number of ads that were coded as having a "purpose" of

16 It is unclear to me why Professor Goldstein refers to "4,000 advertisements airing in 2000." See Ridout, Travis N., Michael Franz, Kenneth Goldstein, and Paul Freedman. 2002. "Measuring Exposure to Campaign Advertising." Unpublished paper, June 19, 2002, at page 17.

17 I say "apparently" since the codes "98" and "99" are conventionally used as "missing data" codes. However, the scores are undocumented in the data set.

providing information or urging action.[18] Since group-sponsored ads constitute less than 14 % of the data base from which the sample was apparently drawn, one would expect that 21 group ads were included in the intercoder reliability data base (and of course that a tiny number of ads would be group-sponsored issue ads).

Consequently, any conclusions about whether this sort of ad was in fact reliably coded cannot be accepted on the basis of an examination of such a small number of ads. Perhaps this reliability test provides some information about candidate and party ads, but it provides virtually no useful information about group-sponsored ads and especially the degree to which group-sponsored ads were reliably and validly coded as to the "purpose" of the ad.[19]

A second consequence of this distribution is that, for whatever reasons, the overwhelming decision of the coders was that these ads represent electioneering. Issue ads were not quite the equivalent of needles in a haystack, but they

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18 The situation is little improved with a sample of 250 ads, the number said by Dr. Krasno and Professor Goldstein in their PS report to be subject to inter-coder reliability checks.

19 The solution to this problem is stratified random sampling. That is, the proper methodology is one in which the original ads are segregated by type on this variable — "strata" — and then sampling takes place within stratum. Of course, with so few ads coded as issue ads in the first place, one would most likely have to adopt a strategy of recoding all ads coded as having an issue purpose and a random sample of those ads coded as having an electioneering purpose. There is no indication in any of the Buying Time documents, published or unpublished, that this was the strategy employed in assessing the reliability of this variable.

were exceedingly rare. Thus, it seems quite likely that even after coding only a few ads, the coders developed a strong expectation, implicit or explicit, that the next ad they coded would be an electioneering ad. It is very difficult to make subjective assessments of infrequently occurring events. Once a coder discerns a pattern in the responses to a subjective variable, it becomes difficult indeed for the coder to "break the habit." [12(2 PCS/ER 00805)] Especially in a circumstance in which there is an ideologically charged bias in favor of finding a particular outcome, "true" issue ads had a very heavy burden to overcome among the coders.

Substantive Consideration of the Results From Question 11

As I have noted, both Professor Goldstein and Dr. Krasno/Professor Sorauf have provided in their expert reports new estimates of the percentage of "genuine" ads/airings that mention or depict candidates and that were aired within the last 60 days of an election. Notwithstanding the flaws in their data bases, it is important that we give their reports close scrutiny.

Professor Goldstein offers Table 7 (immediately following page 24) as his calculations on the 2000 data base. He concludes:

> .... there is persuasive evidence that the BCRA definition of Electioneering Communication is not overbroad in the sense of applying to any meaningful number of advertisements that are perceived as Genuine Issue Ads. Using the coder's classifications, only 3.1 percent of the 45,001 Genuine Issue Ads broadcast by interest groups during the 2000 election cycle would have been covered by BCRA. (Pp. 26-27)

The denominator he uses for these calculations — 45,001 — represents the number of "genuine issue ads" broadcast in

2000. In the use of such a denominator, Professor Goldstein is at odds with both the authors of *Buying Time 2000* and with me. But in order to make some progress, let us put aside the denominator issue for a moment and focus on the numerator.

In his expert report, Professor Goldstein analyzes only 6 ads as "genuine issue ads" that would be prohibited under the criteria adopted in BCRA. These ads are: [13(2 PCS/ER 00806)]

627 KY/CFAW Call Northrup

1389 FAIR/IA Latham Foreign Worker Bill

2862 UT/COC Matheson Cant Decide Rx

1269 CBM/Rx Plan for Seniors 60

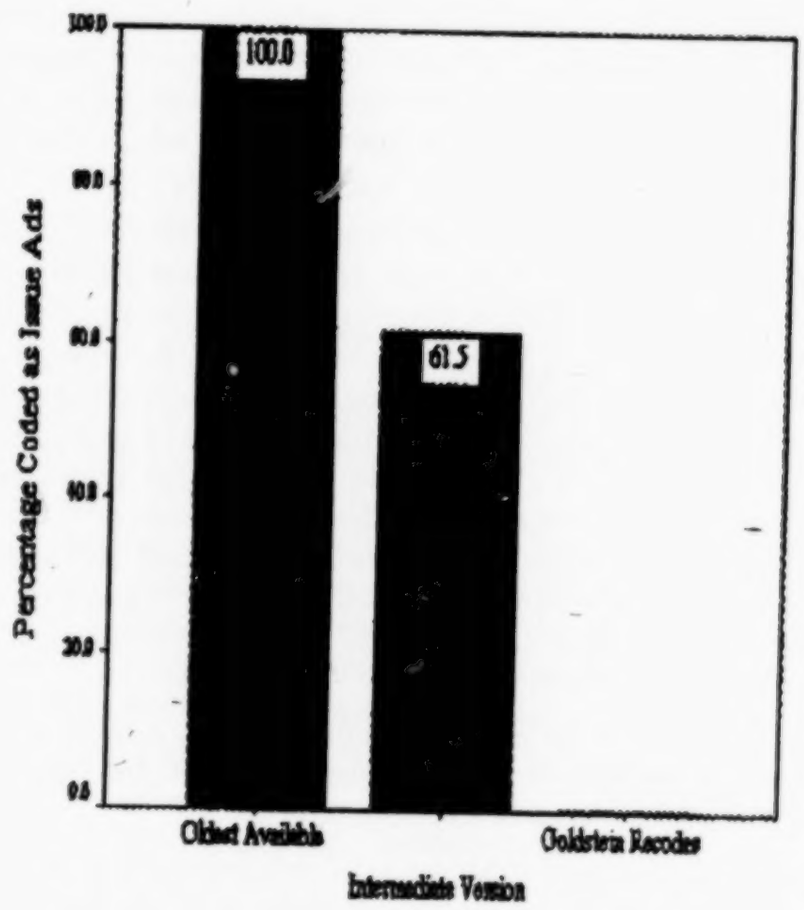
1367 RI/RIWV Langevin Abortion

2107 WI/NPLA Feingold Kohl Abortion 60

These six advertisements were aired 2,123 times in 2000. It is instructive to look at the results of the three codings on Question 11 as they have evolved over the course of the different manipulations of the data set. Figure 1 reports the transformation of these variables as represented in the most recent version of the 2000 data provided by Professor Goldstein as an appendix to his expert report.

The figure makes plain that these ads/airings were transformed from being coded entirely as issue ads to being almost entirely represented as electioneering ads! I recognize that Professor Goldstein, in his expert report, has converted these six ads yet again, changing them back to issue ads as originally coded by the students. But the treatment of these ads demonstrates two important points: Coding these ads is highly subjective and reasonable people disagree about their content, and Professor Goldstein seems to have claimed the authority to manipulate the data base at will. [14(2 PCS/ER 00807)]

Figure 1. The Transformation of the Coding of Question 11



Note: The percentage for the Goldstein transformation of the variable is 0.4 %.

Number of airings = 2,123.

The three variables represented here are:

BT00_Q11 Q11_1 Q11

[15(2 PCS/ER 00808)]

BEST AVAILABLE COPY

As noted above, Professor Goldstein identifies 6 ads in 2000 that would be adversely and unfairly affected because they are "genuine issue ads," broadcast in the last 60 days of the election, and mentioning candidates. Two of these ads (#1367 and #2107) are included in the 30 ads I focused on in my discussion of the 2000 data (see pages 62-63 in my report of 9/30/2002). It is instructive to revisit this analysis based on the new claim by Professor Goldstein that these six ads should now be identified as "genuine issue ads" in the 2000 data base.

Putting these two samples together, we find that these 34 ads (Professor Goldstein's six plus my non-duplicative ads) were aired 15,347 times during the last 60 days of the 2000 election, according to the data base. Using the denominator from my 9/30/2002 report, these airings therefore represent 25.6 % of the 60,006 issue airings (without "magic words") within 60 days of the 2000 election and which depicted or mentioned candidates. What this demonstrates again is that Professor Goldstein's estimates of the impact of the three criteria are wholly dependent on the subjective assessments of the "purpose" of individual ads, assessments that are reasonably subject to debate.

As I noted in my report of 9/30/2002, a more reliable variable exists characterizing the content of the ads. The students were asked to code Question 27:

> 27. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Policy matters
> 2. Personal characteristics
> 3. Both
> 4. Neither [16(2 PCS/ER 00809)]

In my opening report of 9/30/2002, I set forth the view that the data produced by this question are of superior reliability and validity.

The coding on Question 27 is more reliable in part because it does not seem to have been subject to the post-coding manipulations inflicted on Question 11. If we consider once more the ads with the three important characteristics, we discover that the "primary focus" of 51,144 airings was on policy matters. Applying the Goldstein denominator:

51,144 / 60,623 = 84.4 %

This means that any policy that banned ads with these three characteristics would in fact pertain to political communications that overwhelmingly (84.4 %) had policy matters as their "primary" focus. Or to restate Professor Goldstein's conclusions 7 and 8 (page 3):

> 7. An extremely large percentage (84.4 %) of the political television ads aired during 2000 that would have been covered by BCRA were perceived by project coders as having policy matters as their primary focus.
>
> 8. BCRA requirements would have applied to 42.9 % of ads broadcast by interest groups during 2000 which were perceived by the coders as having policy matters as their "primary focus."[20]

---

20 This figure represents 48,370 divided by 112,844: ads with policy matters as their primary focus, mentioning candidates, and airing within the last 60 days of the election.

Comparing the Characteristics of Ads

In Table 9 of his expert report, Professor Goldstein reports data apparently designed to demonstrate that a) "Interest Group Ads with No Candidate" differ from "Interest Group Ads [17(2 PCS/ER 00810)] Mentioning Candidate 60 Days Before General Election," and b) that the latter share some characteristics with "Ads run by Candidates" and "Political Party Ads." The first part of this analysis is indeed interesting, although to the extent that the two types of issue ads do *not* exhibit different characteristics, the second part of the inquiry is not particularly revealing or relevant. Therefore, I set out to test the hypothesis that the two types of issue ads identified by Professor Goldstein in his analysis in Table 9 of his expert report are cut from different cloth.

In column 3 of this table, Professor Goldstein reports data concerning "Interest Group Ads with No Candidate" and in column 4, data for "Interest Group Ads Mentioning Candidate 60 Days Before General Election." The new data set provided as Appendix L to his expert report allows me to approximate his analysis, but also to consider a broader range of characteristics of the airings.[21] Professor Goldstein concludes that these two types of ads are fundamentally different in character. Unfortunately, his analysis fails to report the many ways in which these two groups of ads are similar.

---

21 I cannot replicate the findings in Professor Goldstein's Table 7. Although I can identify in the new data set 55,648 ads sponsored by groups and not depicting a candiate, 2.4 % of these (not 0.0 %) in fact mention "magic words." Moreover, I find from the data set that the size of the second group of ads is 60,087, not 60,623, although my analysis does indicate that 0.0 % of these 60,087 airings mention "magic words."

In Table 1, I report my analysis of the characteristics of these two types of ads. The table demonstrates that these ads are similar in a number of important respects. First, large majorities of both types of ads urge the viewer to take some action; for a majority of these ads, that action involves writing, calling, or telling someone to do something, or sending a message or calling someone to express yourself. Approximately none of either type of ad asks the viewer to vote for someone. A majority of both types of ads give a telephone number for viewers to call. Virtually [18(2 PCS/ER 00811)] all of both types of ads (93.7 % and 98.6%) have policy matters as either their primary focus or have a primary focus on both policy matters and personal characteristics. Interest group ads with no candidate mentioned or depicted tend to stress issues of health care more often than interest group ads mentioning a candidate and airing within 60 days of a general election, but the reverse is true in terms of the issue of Medicare. The most important conclusion I draw from analysis is that these two types of ads have quite similar attributes. This is not surprising since virtually all of them focus on policy matters. [19(2 PCS/ER 00812)]

Table 1. Comparing Group-Sponsored Ads in the 2000 Election

Ad Characteristic	Interest Group Ads with No Candidate (N=55,648)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (N=60,087)
Does the ad urge action?		
% urging some action	72.9%	65.8%
Type of actions urged		
% to vote for someone	1.2%	0.0%
% to write, call, or tell someone to do something, or to send a message or call someone to express yourself	54.1%	53.0%
Information Provided		
% giving telephone number (toll-free or toll)	76.6%	56.8%
Primary Focus of the Ad		
% with a primary focus on policy matters	93.3%	78.8%
% with either a primary focus on policy matters or a primary focus on both policy matters and personal characteristics	93.7%	98.6%
Issue Content		
% addressing Health Care	28.8%	39.2%
% addressing Medicare	34.9%	24.3%

[20(2 PCS/ER 00813)]

Summary of Conclusions about Professor Goldstein's Expert Report

Professor Goldstein's expert report continues to focus on the highly subjective coding of Question 11, ignoring his own evidence on the policy focus of the ads. As I have demonstrated in this rebuttal, ads that have policy matters as their primary focus predominate in the data set in general, as well as comprising a large majority of those ads depicting candidates and broadcast in the last 60 days of the 2000 election (and not mentioning "magic words"). Indeed, the key distinction Professor Goldstein seeks to make between ads with these characteristics and so-called genuine issue ads is not supported by the data, especially insofar as the policy foci of these ads is concerned.

The 1998 Conclusions

In my report of 9/30/2002, I concluded the following about the 1998 data:

> Thus, by this calculation, nearly two-thirds [64.0%] of the group ads that aired within 60 days of [the] 1998 election were coded by the students as "genuine issue ads"; all of these (again in the words of the Brennan Center authors) would be "unfairly caught" by application of the criteria now set forth in BCRA.

It is necessary to determine whether the report of Dr. Krasno and Professor Sorauf affects these calculations.[22]

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22 For reasons I outline above (and in my report of 9/30/2002), I do not accept the method of calculation used in *Buying Time 1998*, and therefore I will not address the portion of the Krasno/Sorauf appendix entitled "SPREADSHEET: 1998 Formula" (pages 13-15,

My calculations were based on two groups of ads. First, I accepted the 2 ads that the [21(2 PCS/ER 00814)] authors of *Buying Time 1998* treated as "genuine issue ads." To that list of 2, Dr. Krasno and Professor Sorauf have now added a third ad (named CENT/Breaux, aired two times — see page 60 and page 20 of the appendix). Second, I accepted the original coding by the students of 8 ads. These are all ads that Professor Goldstein transformed from issue ads to electioneering ads after the coders had completed their job. Were I to re-do my calculations on the basis of the 2 newly designated CENT/Breaux airings, the figures would change insignificantly (since so few airings are involved).

Dr. Krasno and Professor Sorauf make several other important "corrections" to the original 1998 calculations (see pages 3-4 of the appendix) and ultimately derive a numerator of 713 ads. The authors refer to these as "all pure issue ads (as rated by the coders) by groups that appeared within 60 days of the election and mentioned a candidate by name" (see Appendix page 3). Since they acknowledge in their description of these ads the importance of coder ratings — and incorporating the justification I presented in my report of 9/30/2002 — I revert to the original student codings of the 8 ads I identified in my report, and (accepting their identification of 713 airings only for the sake of argument), calculate a new percentage as follows:

(713 + 2,405) / 5,064 = 61.6 %

Again for the sake of argument, let me accept their adjusted 60-day denominator, and the percentage becomes

(713 +2,405) / 4,847 = 64.3 %

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pagination I assigned to the pages). Instead, I will consider their calculations as reported in "SPREADSHEET: 2000 Formula" (pages 16-21, my pagination).

Thus, the substantive conclusions I drew in my report of 9/30/2002 remain unfazed by this new analysis.

Since my report was completed, new information has become available about the airings [22(2 PCS/ER 00815)] of these 8 ads. In particular, the "Index of AFL-CIO Issue Advertising, 1995-2001" has been produced as an Exhibit to Ms. Mitchell's declaration. This document allows me to address the problem of so-called cookie cutter ads. Two of the eight ads appear to be cookie-cutter ads (#11 and #15). According to the data base, these ads were broadcast in several different locations throughout the country. Unfortunately, however, the CMAG technology does not capture the text or images of such ads, so one cannot confirm from the storyboards that a candidate was actually mentioned (because storyboards do not exist, the name of the individual mentioned or depicted in each ad is not known and must be inferred). In their expert report, Dr. Krasno and Professor Sorauf have offered a methodology for addressing this problem (see their Appendix).

Following the methodology of Dr. Krasno and Professor Sorauf, I have reexamined the airings of these 8 ads. In 8 instances, we do not have any verifiable information as to whether a candidate was identified. These are:

Ad number	Market Location
2	Washington DC
1411	Greenville
11	Albuquerque
11	Birmingham
11	Kansas City
15	Albuquerque
15	Grand Rapids
15	Kansas City

For the remainder of the airings of #11 and #15, the data base is compatible with the information [23(2 PCS/ER 00816)] presented in the AFL-CIO document, and therefore I accept the data base's coding of these ads as mentioning candidates.

With this adjustment to the data, the figures are:

(836 + 1,736) / 5,064 = 50.8 %

Thus, using the methods adopted by Dr. Krasno and Professor Sorauf in the appendix to their expert report, about one-half of the airings in 1998 would be, in the words of the authors, "unfairly caught" by application of the BCRA criteria, if one were to accept (as Professor Goldstein does in his analysis of the 2000 data) the coders' determinations of the purposes of the ads prior to Professor Goldstein's manipulation of the data.

For the sake of argument, let me produce one additional calculation. Let me accept the new claim of Dr. Krasno and Professor Sorauf that their portion of the numerator is 713 airings. Let me accept their denominator as 4,847. And let me accept my new calculations on the 8 student-coded ads. The new percentage therefore becomes:

(713 + 1,736) / 4,847 = 50.5 %

Perhaps the only other adjustment that could be made to this figure would be to declare, as Dr. Krasno and Professor Sorauf do, contradictory evidence as missing data and exclude the airings from the calculations. Such a strategy would only serve to reduce the denominator in the above quantity, thereby increasing the percentage to some figure above 50.5 %.[23] To be clear, this analysis in effect assumes

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23 For instance, the data base reports that ad #2 was aired in the Washington DC market, although the storyboard mentions North Carolina Senator Faircloth. According to the Dr. Krasno and Professor Sorauf methodology, these airings could be treated as missing data and therefore excluded from both the numerator and the denominator for purposes of these calculations.

that none of the ads airing in the markets for which we have no [24(2 PCS/ER 00817)] independently verifiable information actually identified a candidate in that market. Consequently, this 50.5 % figure represents the statistical floor under the Krasno/Sorauf methodology; the 64 % figure cited in my report of 9/30/2002 (calculated from the data base itself) provides the ceiling.

The dispute over this percentage reflects two fundamental truths about this data set. First, the coding of the ads is highly subjective. It is difficult if not impossible to determine what the "purpose" of an ad is, and reasonable people will disagree even about categorizing the manifest content of an ad. Since errors in coding a single ad are amplified by the number of showings of that ad, the conclusions one draws from the data base are highly volatile and sensitive to errors.

Second, this data base has been subject to numerous post-coding manipulations. Not only does this undermine all of the conclusions and calculations reported in *Buying Time 1998*, but it also strongly undermines the claim that the student coding has much to do with the figures in the "final" analysis.[24] The figures Dr. Krasno and Professor Sorauf produce are no longer a function of the student coding, but instead reflect a series of ever-changing manipulations and recodings of the data base. Such a methodology sabotages any claim the study might make to scientific accuracy.

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24 Indeed, I should note that the report by Dr. Krasno and Professor Sorauf may not be the final analysis, since there may ultimately be some means of resolving various missing data problems that afflict their calculations.

Groups Communicating With Citizens

Missing from the entire discussion of ads and airings in the expert reports submitted is any consideration of the people who consume these ads. After all, the purpose of all ads is to communicate with citizens. Fortunately, the Buying Time data sets provide some information [25(2 PCS/ER 00818)] that allows us some purchase on this important question.

The Buying Time data bases include a variable representing the "Gross Rating Points" of each airing. As described on page 6 of *Buying Time 1998:* "Gross ratings points are the sum of ratings for a particular time: if the local news is watched by ten percent of viewers with televisions, an ad run during the program represents ten gross ratings points." These points are of course idiosyncratic to each individual airing, and were apparently added to the data set by CMAG.

According to Dr. Krasno and Professor Sorauf, there were 713 airings in 1998 that the authors treat as "genuine issue ads," depicting a candidate and broadcast within 60 days of the election. These ads and the markets in which they were shown are listed on page 20 of their appendix. According to the data base, no Gross Ratings Points estimate is available for 6 of these airings.

Using the 1998-1999 Neilsen estimates of the number of households with television sets in the seven markets in which these ads were broadcast[25], and using the Gross Ratings Points to estimate the number of households viewing each airing, I find that these 707 airings represent communications with a staggering number of household — 30,108,857. Thus, were these ads (just the ads accepted by Dr. Krasno and Professor Goldstein as "genuine issue ads") prohibited, over

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25 A copy of these estimates is attached as Exhibit 2.

30 million group-citizen political communications would be affected (and this figure is based on the quite conservative assumption that each household only has a single person viewing television). [26(2 PCS/ER 00819)]

Why Would Interest Groups Attempt to Persuade Citizens on Policy Matters During the Election Season?

Professor Goldstein asserts in his expert report that a reasonable interest group would not air its issue ads during an electoral period. His argument is based on a couple of suppositions:.

1) the ads are more expensive at this time of year
2) citizens are overwhelmed with information and will not pay attention to the ads, and
3) partisan attachments harden as the election draws near.

He cites the work of William McGuire and John Zaller. In fact the theory he cites argues in favor of exactly the opposite conclusion.

Issue advertising is an exercise in persuading citizens. Political Psychologists have long known (McGuire) that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change. Unfortunately, these stages in the process are related to each other.

As it turns out, those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them. This results in a paradox. Those most easily reached are least easily changed; those most easily changed are those most difficult to reach. This paradox has long bedeviled those researching processes of persuasion.

Those with strong political attitudes pay attention to politics year round, in part because the reason why they have strong attitudes in the first place is because political affairs are [27(2 PCS/ER 00820)] interesting to them. Those with weak attitudes, on the other hand, only pay attention to political affairs under the most extreme circumstances (indeed, perhaps only when there is little choice but to pay attention because the airwaves are saturated with political information). Thus, election periods open a window of opportunity to reach those citizens who are most likely to be influenced by policy advertising. During the election, those with weak and potentially alterable attitudes are paying attention to political affairs. It therefore makes sense that an interest group would attempt to influence people when in fact they are most "influencable." Just as one does not attempt to sell Christmas trees in July (because people will screen out such attempts and will not pay attention to them), interest groups will try to take advantage of the window of opportunity opened by the electoral season. Consequently, it is entirely reasonable that an interest group would attempt to reach citizens on public policy issues during any given election period.

The last point Professor Goldstein makes is that partisan attachments harden. By this logic, candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert. In fact, that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views.

This point about susceptibility to persuasion within 60 days of an election turns out to be intimately related to the controversy concerning the most appropriate denominator to use in our calculations of the proportion of "genuine issue ads" affected by BCRA. Those who would use a denominator based on all issue ads aired in the year are

implicitly making the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election. As I have indicated, this is not so. The damage of prohibiting an ad within 60 days of an [28(2 PCS/ER 00821)] election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year.

Thus, I conclude that there is nothing peculiar or nefarious about interest groups seeking to influence citizens on policy matters during the last 60 days of an election period.

Overall Summary of This Rebuttal

The various reports based on the 1998 and 2000 data are built upon a house of cards. As more information about the methodology becomes available — information that would ordinarily have become public were these reports subject to peer review — one sees the numerous infirmities in the data base. From the inability of CMAG to capture each unique ad (even in the limited part of the country it purports to monitor), to the subjectivity of the student coding, to the unrestrained and undocumented recoding of the data by Professor Goldstein, one comes to see that this data set and the analyses based upon it cannot be trusted.

Dr. James L. Gibson

October 7, 2002

[1(2 PCS/ER 00831)]

Supplement to Rebuttal Expert Report of October 7, 2002

1998 Data

Dr. James L. Gibson

November 5, 2002

On Friday, November 1, 2002, I understand that Dr. Jonathan Krasno, principal author of *Buying Time 1998*, produced a compact disk with a variety of data files on it (JSK 00000001). My examination of these files has led me to conclude that a) most of these files have not been produced earlier in this litigation, and b) at least one of the new data sets differs from the earlier produced data base on the coding of the crucial variable Question 6. Because this new data base reveals new and different results for the coding of Question 6, I deem it essential to submit this brief supplement to my rebuttal report of October 7, 2002.

The New Data Bases

The earliest incarnation I have previously been provided of the *Buying Time 1998* data base is a file entitled 307K final5.sav, dated 3/31/2000 (6:57 AM). I believe this file was produced as a supplement to Dr. Krasno's expert report. Prior to receiving that data set, the earliest available version of the data set produced in the litigation was entitled Final_1998_Cmag.sav, dated 6/23/2000.

On the November CD produced by Dr. Krasno is a data set named 307K final3.sav, dated 1/15/2000. Also included on the CD are what appears to be two later versions of the data set: [2(2 PCS/ER 00832)]

307K final4.sav, dated 1/25/2000

307K final5.sav, dated 3/31/2000 (3:57 PM)

This latter data set seems to be similar to the data set Dr. Krasno produced as part of his expert report, although I have not undertaken the analysis necessary to confirm that conclusion, and the time stamp on the data set differs (and is later than the one for the data set produced by Dr. Krasno).

The crucial new data set is one Dr. Krasno did not produce as part of his expert report: 307K final3.sav, dated 1/15/2000. This data set does *not* appear to be the original version of the data base, since at least one of the syntax files (the files that include the statistical commands) provided on the new CD refers to a data set entitled 'c:\Cmag\master1.sav'. That file does not exist on the newly produced CD. Thus, the file 307K final3.sav is surely not the original data but is the earliest version of the 1998 data base I have been able to examine.

The Coding of Question 6 in "307K final3.sav"

The coding of 8 ads on Question 6 has been the object of considerable controversy in this litigation. These ads are: 2, 7, 11, 15, 16, 21, 22 and 1411. These ads are controversial since my examination of the original coding sheets completed by the student coders revealed that these ads were coded by the students as "genuine issue ads" on Question 6, but that in all of the data bases produced for 1998, these ads were scored as "electioneering" ads on Question 6.[1] It is instructive to note exactly which files contain the representations of these ads as "electioneering." The [3(2 PCS/ER 00833)] following table reports this information.

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1 The coding sheets and the storyboards for these eight ads were attached as Exhibit 7 to my expert report of 9/30/2002.

Ad Id Numbering	Original Student Coding	Data Set #1	#2	#3	#4	#5	#6
2	issue	candidate	candidate	candidate	candidate	candidate	candidate
7	issue	candidate	candidate	candidate	candidate	candidate	candidate
11	issue	candidate	candidate	candidate	candidate	candidate	candidate
15	issue	candidate	candidate	candidate	candidate	candidate	candidate
16	issue	candidate	candidate	candidate	candidate	candidate	candidate
21	issue	candidate	candidate	candidate	candidate	candidate	candidate
22	issue	candidate	candidate	candidate	candidate	candidate	candidate
1411	issue	candidate	candidate	candidate	candidate	candidate	candidate

Data Set #:

1. 1998 new1.sav. Dated: 5/14/2002. Brennan Center CD #4.
2. 1998 sav. Dated: 5/9/2002. Brennan Center CD #4.
3. 1998 REAL.SAV. Dated: 3/7/2002. Brennan Center CD #4.
4. 307K final5.sav. Dated: 3/31/2000. Krasno CD.
5. Final _1998_Cmag.sav. Dated: 6/23/2000. Professor Goldstein. "1998 CMAG Data" CD.
6. CB.sav. Dated: 1/16/2001. Brenna Center CD #6.

Moreover, one of the newly produced data sets — 307K final4.sav — shows these ads as all coded as candidate ads.

However, the file 307K final3.sav (the earliest dated version of the data set produced last Friday) contains different results for Question 6 for these eight ads. Specifically, the ads are [4(2 PCS/ER 834)] scored as follows:

Id Number	Question 6 Coding
2	2. Candidate
7	99. Not coded
11	1. issue
15	1. issue
16	1. issue
21	1. issue
22	1. issue

1411 1. issue

Thus, the newly produced data sets indicate that changes were made in the coding of seven of these eight ads between the data sets 307K final3.sav and 307K final4.sav. Using the date on which these files were created, as indicated on Dr. Krasno's CD, the codings of these ads were altered between January 15, 2000, and January 25, 2002.[2] Based on my examination of the data sets and the associated computer codes provided by Dr. Krasno on this CD, I conclude that someone altered the student codings on Question 6 on these 7 ads sometime between January 15, 2000, and January 25, 2000. The data sets contain no information justifying this alteration of the data base. [5(2 PCS/ER 00835)]

The Consequences of the January Alteration

The result of altering the scores of these 6 ads is to convert 2,202 airings from "providing information/urging action" to "generating support/opposition to candidates."[3] This change has highly significant consequences for the substantive conclusions to be drawn from the data base. For instance, *Buying Time 1998* asserts that only two ads in 1998 were "genuine issue ads" that would be adversely affected by a law such as BCRA. With the original coding on Question 6, as reflected in the data base, that number quadruples, from 2 ads to 8 ads (2 + 6 ads).

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2 I recognize that the date stamps on computer files can be easily altered. Nothing in my examination of the data sets on this CD generates suspicion that any such date stamp alteration has taken place.

3 Note that the January alteration also resulted in another 129 airings being converted form missing data ("not coded") to "electioneering".

The representation of these ads in this earliest known (or produced) version of the 1998 data base also has implications for the calculations I reported in my expert rebuttal report of 10/7/2002 ("Rebuttal to the Expert Reports of Kenneth M. Goldstein and Jonathan Krasno and Frank J. Sorauf"). On pages 21-23 of that report, I conducted some calculations based on my examination of the original coding sheets for these ads. If I redo those calculations based not on the student coding sheets, but instead on the newly produced data set, 307K final3.sav, the following figures result.

- Page 21: The number of airings for the 6 ads shown to be issue ads in 307K final3.sav is 2,199, not the 2,405 reported on page 21 of my rebuttal report. Thus, the new calculations are:

(713 + 2,199) / 5,064 = 57.5%

Also on this page, I accept the Krasno/Sorauf adjusted 60-day denominator, resulting in the following percentage:

(713 + 2,199) / 4,847 = 60.1%

[6(2 PCS/ER 00836)] Thus, the substantive conclusions supported by the new figures do not differ from those I drew in my rebuttal report.

- Page 23: Here, I reported some calculations based on confirming the time period during which the ad was aired (within 60 days of the election), whether the ads used so-called magic words (they do not), and whether I could confirm that a candidate was mentioned in the ads (confirmed). Repeating this analysis based on the newly produced data set (307K final3.sav), rather than the original student coding sheets, results in exactly the same figure. That is:

(836 + 1,736) / 5,064 = 50.8%

and

(713 + 1,736) / 4,847 = 50.5%

Thus, according to the original student coding of the ads and *according to the data base produced by Dr. Krasno on November 1, 2002*, and accepting for the sake of argument

the other calculations and adjustments of Dr. Krasno in his expert report, 50.5% of the airings in 1998 would be improperly subject to a law such as BCRA.

Concluding Comments

My earlier analysis of the reports and the data from the 1998 and 2000 studies led me to observe that the methodologies and procedures used in the analyses fall far below the standards of accepted scientific analysis. Nothing in this latest episode of manipulated data and additional data bases leads me to a different conclusion.

Dr. James L. Gibson
November 5, 2002

EXPERT REPORT OF KENNETH M. GOLDSTEIN ON BEHALF OF INTERVENOR DEFENDANTS

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EXPERT REPORT OF

KENNETH M. GOLDSTEIN

I. QUALIFICATIONS

I am an associate Professor of Political Science at the University of Wisconsin-Madison, where I specialize in the study of interest groups, political advertising, and survey methodology. I received my B.A. in Political Science from Haverford College in 1987 and my Ph.D. in Political Science from the University of Michigan in 1996. The focus of my Ph.D. studies was American politics and research methodology. I have served on the faculty at the University of Wisconsin-Madison since 2000, teaching courses and conducting research on American politics and survey research methodology. I was granted tenure at the University of Wisconsin-Madison during the last academic year.

I am on the Dean's Oversight Board of the Survey Research Center at the University of Wisconsin. In addition, I serve on the College of Letters and Science Human Subjects Committee, which approves all research involving human subjects within the college. I have also taught courses in survey research and served on the Dean's planning committee for the Survey Research Center at Arizona State University from 1996 to 2000. I have served on two planning committees for the National Elections Study, renowned as the premier survey research project on elections conducted in the scholarly community.

I am the author or co-author of 17 publications (books, book chapters, and refereed journal articles). The majority of my work has focused on studying the use and effectiveness of political advertising as well as interest group lobbying tactics. Attached as Appendix B is a copy of my curriculum vitae, which lists in more detail my academic background, positions, and publications.

[2] I am being paid $5,000, plus reimbursement of travel expenses, by the Brennan Center for Justice for my work in

this litigation. I have also received a grant of $508,000 (of which my salary constituted $20,000) from the Pew Charitable Trusts to conduct research on political advertising during the 2002 election cycle. While that grant is unconnected with my work on this litigation, Pew has agreed to allow me to work concurrently on this litigation and the 2002 election project.

In the preceeding four years, I have testitified as an expert in *Luetzow v. Guardian Pipeline,* a condemnation hearing in Jefferson County, Wisconsin. I have also been retained as a testifying expert by ANR Pipeline Co. in the case *Arentz v. ANR Pipeline Co.,* pending in Wisconsin Circuit Court in Waukesha. In both of these cases, I bill my time at $300 an hour.

II. Summary of Findings

I submit this report, describing the nature of political advertising in federal elections, to assist the Court in its assessment of the Bipartisan Campaign Reform Act (BCRA). BCRA's provisions focus on broadcast ads sponsored by parties and interest groups. My main focus in this report is on the nature of interest group advertising in the 2000 contest and, more specifically, the ads and sponsors that would be directly affected by BCRA provisions relating to ads that mention or depict a candidate and are broadcast within 60 days of a general election or 30 days of a primary election for federal office. A secondary focus is on the nature of advertising by political parties.

I draw primarily on a database of political television advertisements aired in the top 75 media markets, which serve 80 percent of the country's population. The data are compiled by the Campaign Media Analysis Group (CMAG), a commercial firm that tracks advertising for political clients.[1] University of Wisconsin-Madison graduate **[3]** assistants and I processed the 2000 CMAG data. I have used these data in a series of reports and articles to describe the source, content,

[1] The scope of the CMAG data is discussed in Section IV below.

and targeting of political advertising in the 2000 elections. In this report, I set forth nine principal conclusions that emerge from my study of the CMAG data:

1. Advertisements sponsored by parties and interest groups comprised a significant and increasing portion of political television ads broadcast in federal races over the course of the entire year and especially during the last 60 days of the 2000 election.
2. The "magic words" defined in *Buckley v. Valeo* do not provide an effective way to identify political television ads that have the purpose or effect of supporting or opposing candidates for election to a public office.
3. Interest group financed ads that depicted or mentioned candidates for federal office were concentrated in the weeks immediately preceding the election and stopped on Election Day. Interest group ads that did not mention or picture candidates for federal office were distributed more evenly throughout the year, rising and falling with the ebb and flow of the legislative calendar.
4. Interest group ads that mentioned a candidate within 60 days of the general election almost invariably targeted House or Senate candidates in hotly contested races or presidential candidates in battleground states.
5. Ads that mentioned or depicted federal candidates for office differ from ads that did not mention or picture candidates in other ways, such as their content, their distribution over time, their geographic dispersion, etc.
6. Ads that did not mention or depict a candidate are readily distinguishable from quintessential electioneering ads (such as ads run by a candidate seeking election to public office) in numerous ways such as their content, their distribution over time, their geographic dispersion, etc.

7. Virtually all (97.7 percent) political television ads aired during 2000 that would have been covered by BCRA were perceived by project coders as having an electioneering purpose.

8. BCRA requirements would have applied to 3.1 percent of ads broadcast by interest groups during 2000 which were perceived as genuine issue ads by coders.

9. Broadcasting issue ads in close proximity to an election is not necessarily an effective way to inform voters about public policy issues or generate action on such issues.

[4] To put these findings into context, I first summarize the salient characteristics of campaign finance regulations and how the information provided in this report is relevant. I also describe in more detail the major source of data used in this report and in my scholarly work on television advertising over the last six years.[2]

III. Overview of Campaign Finance Regulations and BCRA

The Federal Election Campaign Act (FECA), passed in 1971, as interpreted in ensuing legal decisions—primarily *Buckley v. Valeo*, decided by the Supreme Court in 1976—has defined two classes of political money. *First*, money for express advocacy (commonly known as "hard money") is money that pays for activities that directly advocate the election of a federal officeholder. Hard money is subject to FECA's express advocacy regulations that require the disclosure of contributors and expenditures and contain certain limitations on the amounts of contributions and the eligibility of certain types of donors (*i.e.*, unions and corporations). *Second*, money to fund other political activities (such as general party building, educating citizens on issues or lobbying on legislation) is often described as "soft money." "Soft money" is exempt from some of the disclosure requirements

[2] Tables attached as Appendix A to this Report constitute an integral part of the Report whether or not referenced in the text.

and source and amount limitations applicable to "hard money."

A footnote in the Supreme Court's *Buckley v. Valeo* decision defined express advocacy by reference to whether the ads used particular words or phrases such as "vote for," "defeat," or "Jones for Senate." These words have become widely known in political science and legal circles as "magic words."

BCRA generally proscribes soft money donations to political parties for any purpose, including financing advertising—almost always candidate-focused—that the **[5]** parties sometimes call "issue advertising." BCRA also imposes certain requirements on interest groups that broadcast Electioneering Communications, which BCRA defines as ads broadcast on radio or television that mention or depict a candidate, are broadcast within 60 days of an election (or 30 days of a primary), and are targeted at a candidate's voters. Any interest group broadcasting Electioneering Communications is required to disclose its contributions and expenditures (above certain minimum thresholds), raise money under particular contribution limits, and refrain from accepting contributions from union or corporate treasuries.

IV. The Campaign Media Analysis Group Data

Until recently, the lack of comprehensive data on the content, timing, volume and targeting of political advertising has limited what policymakers, journalists and scholars can report about the magnitude, content and targeting of political television ads.

A technology marketed by Competitive Media Reporting (CMR) now tracks television advertising activity in the country's major markets. The ad tracking technology monitors the transmissions of the national networks (ABC, CBS, NBC and Fox) as well as 42 major national cable networks (such as CNN, ESPN and TBS). The system monitors local television advertising in the country's top 75 media markets (comprising approximately 80 percent of the nation's popu-

lation).[3] The system's software recognizes the electronic seams between programming and advertising. When the system first detects a commercial spot's unique broadcast pattern, it downloads the ad and creates a "storyboard" of the sort described below. Analysts at CMR classify the advertisements into particular categories by product for commercial clients and by candidate or sponsor for political clients. The ads are then tagged with unique digital fingerprints. Thereafter, **[6]** the system automatically recognizes and logs that particular commercial wherever and whenever it airs. The ad tracking information is marketed to political clients by the Campaign Media Analysis Group (CMAG).

In 2000, the Brennan Center for Justice at New York University purchased the CMAG data through a grant from the Pew Charitable Trusts.[4] The 2000 data were processed and coded by teams of graduate and undergraduate students working under my supervision at the University of Wisconsin-Madison.

CMAG supplied two different forms of data that were used in this project. First, for every political ad produced, CMAG created a storyboard, that is, a complete transcript of all audio and a still capture of every fourth second of the video. A nearly complete set of the storyboards for 2000 appears as electronic Appendix K to this report (other sample storyboards appear in other Appendices).

The second type of CMAG data involves tracking political ads in the nation's top 75 media markets, as well as all ads run on the major national broadcast and cable networks.

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[3] Lists of the markets and stations are included in Appendix G to this Report. CMAG data do not include ads broadcast on local cable channels.

[4] The Brennan Center published two reports, entitled *Buying Time: Television Advertising in the 1998 Congressional Elections* (*"Buying Time 1998"*) and *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (*"Buying Time 2000"*), which used databases prepared under my supervision, upon which I relied in part to prepare this report. These reports are attached as Appendices C and D.

The unit of analysis in these files is an individual broadcast, or "airing", of a unique ad. For each such airing, CMAG reported on the time, length, station, show, and estimated cost. For each ad, this frequency information was then merged with the coded content from the storyboards in order to produce a single, comprehensive data set. Appendix E contains an analysis describing in more detail the methodology used to code and process the CMAG data.

I have great confidence in the CMAG data in terms of tracking the airings of particular ads at particular times. Appendix I contains a copy of an analysis, **[7]** "Measuring Exposure to Campaign Advertising", that I have co-authored with two graduate students, Travis Ridout and Michael Franz, and a colleague at the University of Virginia, Paul Freedman. This analysis is currently under scholarly review at the journal, *Political Communication*. It provides a detailed explanation of the validity of the CMAG frequency data and the coding process.

The CMAG storyboards enabled us to undertake an extensive analysis of the ads and develop a database of information concerning political television advertising.[5] Specifically, a team of students (the coders), working under my supervision, assessed the content of each of these storyboards on a wide range of topics, such as content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc. (see Appendix F for complete coding sheet). Multiple coders reviewed a subset of storyboards as a check on the reliability of the coding. I reviewed all ads financed by interest groups and broadcast within 60 days of a general election. I also reviewed and revised the coding where coding by the initial coders was in conflict or where I determined that an error had been made.

In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: "In your opinion, is the purpose of the ad to provide in-

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[5] The database is attached to this this report as electronic Appendix L.

formation about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?" In this report, I refer to ads coded as providing information or urging action as "Genuine Issue Ads," and ads coded as generating support or opposition for a particular candidate as "Electioneering Ads."

[8] V. The Scope of Political Advertising

Advertising in the 2000 election was financed by three principal groups: (1) the candidates; (2) political parties; and (3) interest groups. Some interest groups formed political action committees (PACs), which are regulated under current election laws, and aired ads sponsored by these PACs. Most interest group ads, however, were not sponsored by PACs, and fell outside FECA regulation.

In the 2000 election cycle—*i.e.*, from January 1, 2000 through Election Day—the CMAG database collected 970,424 political television ad broadcasts, 838,169 of which applied to federal races, which were financed by candidates, political parties and interest groups at a cost roughly estimated at $720 million. Thirty-six interest groups financed the broadcast of political television advertisements that would have fallen within BCRA's coverage. During the federal elections in 2000, interest group spending comprised 16 percent of all political television ads broadcast at an estimated cost of $93 million; political parties paid for 27 percent at an estimated cost of $162 million; and candidates paid for 52 percent at an estimated cost of $338 million.[6]

These figures, in fact, underestimate television expenditures because the CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising

[6] The remaining 5 percent of ads were coordinated expenditures in the presidential race, with almost $30 million spent on those advertisements. Coordinated expenditures are those in which a candidate and a party jointly pay for the cost of the advertisement.

during the peak season of political campaigns when the demand for television advertising time pushes up spot prices.

In the federal election of 2000, a total of 838,169 ads were broadcast, of which 36 percent (301,521) were aired in the presidential contest, 29 percent (241,497) in Senate contests, and 29 percent (240,490) in House elections.[7]

[9] In House and Senate races, a total of 481,987 ads were broadcast in 2000, an increase of 64 percent over the 293,452 aired in 1998.

Interest group expenditures for political television ads increased most dramatically, rising from approximately $11 million in 1998 to an estimated $93 million in 2000.

Tables 1A and 1B set forth the breakdown of political advertising among candidates, political parties, and interest groups during the 1998 and 2000 election years (January 1 through Election Day):[8]

[7] The remaining 6 percent of ads were coordinated expenditures.

[8] Aside from the "All Political Ads" category, the numbers in the tables reflect only those ads that refer to a candidate, and thus omit certain ads which may have run in the presidential, Senate, or House races which did not mention a candidate.

Table 1A: Political Advertising Activity in the 1998 Election Cycle[9]

	Total		Candidates		Parties		Interest Groups	
	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count
All Political Ads in Federal Races	$172,800,000	295,625	$136,600,000	229,850	$25,600,000	44,485	$10,700,000	21,290
Ads Referring to Federal Candidate	$163,100,000	277,537	$135,300,000	227,561	$24,600,000	42,599	$3,200,000	7,377
Ads Referring to Presidential Candidate	—	—	—	—	—	—	—	—
Ads Referring to Senate Candidate	$99,100,000	153,718	$83,600,000	127,004	$14,800,000	25,274	800,000	1,440
Ads Referring to House Candidate	$64,000,000	123,819	$51,700,000	100,557	$9,800,000	17,315	2,400,000	5,937

Table 1B: Political Advertising Activity in the 2000 Election Cycle[10]

	Total		Candidates		Parties		IG—PAC		IG—Non-PAC		Coordinated Expenditures	
	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count	Est. Cost	Count
All Political Ads in Federal Races	$624,218,204	838,169	$338,443,584	433,811	$162,353,178	230,368	$2,073,436	3,688	$90,461,349	129,647	$29,166,653	37,938
Ads Referring to Federal Candidate	$581,295,000	780,281	$337,458,696	432,197	$162,163,762	229,860	$2,070,388	3,663	$48,756,139	74,024	$29,166,653	37,938
Ads Referring to Presidential Candidate	$205,603,871	300,959	$78,151,616	115,352	$81,467,696	123,517	$129,280	222	$16,447,813	23,628	$29,166,653	37,938
Ads Referring to Senate Candidate	$216,422,636	239,891	$168,021,425	171,713	$37,656,530	52,953	$1,113,163	2,061	$8,520,989	11,522	$0	0
Ads Referring to House Candidate	$159,263,459	239,416	$91,285,655	145,132	$43,039,536	53,390	$827,945	1,380	$23,782,303	38,859	$0	0

[9] Figures taken from the expert report of Jonathan Krasno and Frank Sorauf.

[10] "Total" column includes ads for which the sponsor was unknown.

[11] VI. THE ROLE OF INTEREST GROUPS AND POLITICAL PARTIES IN POLITICAL TELEVISION ADVERTISING

As these tables demonstrate, political parties were the largest purchasers of television ads in the 2000 presidential campaign. Parties purchased 41 percent of such ads, candidates 38 percent and interest groups 8 percent.[11] Interest groups broadcast one commercial for every five broadcast by the candidates in the presidential election of 2000. Table 2 shows the breakdown by funding source of advertising in certain battleground states. In certain states, interest group advertising rivaled that of the candidates or parties. For example, in Missouri, interest groups ran almost three-quarters as many ads as candidates, while in Washington State, interest group ads exceeded 50 percent of the candidates' ads.

[11] The remaining ads were coordinated expenditures.

Table 2:
Concentration of Interest Groups' Presidential Candidate-Mention Advertising in Battleground States Broadcast Within 60 Days of the 2000 Election[12]

State in which Candidate Is Mentioned	Interest Groups		Political Parties		Candidates	
Florida	3,338	11%*	9,370	10%*	6,527	9%*
Missouri	2,967	9%	5,309	6%	4,104	6%
Pennsylvania	2,807	9%	5,289	6%	4,895	7%
Washington	2,339	7%	5,621	6%	4,357	6%
Wisconsin	2,067	7%	3,983	4%	3,361	5%
Michigan	2,000	6%	5,068	5%	4,411	6%
Ohio	1,669	5%	6,199	7%	5,351	7%
Oregon	1,446	5%	2,082	2%	1,801	3%
Nevada	896	3%	1,160	1%	1,546	2%
New Mexico	796	3%	1,913	2%	2,500	3%
West Virginia	786	3%	2,112	2%	1,754	2%
Minnesota	558	2%	671	1%	105	0%
Tennessee	377	2%	2,074	2%	955	1%
Iowa	379	2%	1,514	2%	1,297	2%
Arkansas	228	1%	2,266	2%	1,564	2%
Maine	157	1%	1,109	1%	1,119	2%
New Hampshire	75	0%	2,159	2%	1,142	2%
Other States	8,384	27%	34,833	38%	24,92	35%
TOTAL	**31,269**	**100%**	**92,732**	**100%**	**71,716**	**100**

[12] I determined which states were battleground states based on my professional review of various media sources. See, for example, http://www.cnn.com/interactive/allpolitics/0010/ battle-ground.states/battlegroundstates.html. In a few cases, a media market was capable of reaching viewers in multiple states. For example, ads aired in the Philadelphia market reached viewers in both Pennsylvania and New Jersey. In this Table, for media markets which reached more than one state, the number of ad airings are included in each of the states, resulting in a total which slightly overstates the total number of airings of candidate-mention ads within 60 days of the presidential election. This assignment of media markets to more than one state is also the reason why the Total numbers in this table do not correspond exactly to the numbers provided in Table 4's "Ads Referring to a Presidential Candidate Within 60 Days."

*Percentages may not total exactly to 100% due to rounding.

[13] As a general matter, interest group ads that would have been defined as electioneering under the BCRA formulation were even more significant in House elections, accounting for 17 percent of total House ad broadcasts during the 2000 election cycle. Parties accounted for 22 percent of total television ads run in House elections and candidates, 60.6 percent.[13]

Party expenditures on television advertising were almost exclusively devoted to promoting their candidates. 99.8 percent of party financed television ads mentioned or depicted a candidate. Only 1.8 percent even mentioned the name of the party and many fewer promoted the candidate by virtue of his of her party affiliation.[14]

VII. The BCRA Universe of Interest Group Electioneering

The CMAG database presents an informative view of the interest group financed political television ads that are the focus of BCRA's Electioneering Communication regulations, that is, ads that mentioned a candidate and were broadcast within 60 days of the general election. As shown in Table 3, 35 interest groups broadcast communications on television that would have been defined as electioneering by BCRA during the 2000 elections. The top ten of those interest groups, listed below, sponsored 87 percent of the total amount spent by all interest groups on such communications during the 2000 election:

Citizens for Better Medicare
Chamber of Commerce
Planned Parenthood

[13] The remaining 0.4 percent were financed by undetermined ad sponsors.

[14] Virtually all ads contain a "tag line" which identifies the organization financing the ad, which may include the party name where appropriate.

AFL-CIO
Women Voters: A Project of Emily's List
Americans for Job Security
Business Round Table
[14] Handgun Control
Sierra Club
League of Conservation Voters

The top twenty interest groups accounted for 90 percent of all monies spent on communications that would have come under the BCRA regime.

The principal sources of interest group financing for Electioneering Communications were for the most part readily recognizable forces in American politics. An exception is an organization unrevealingly described as Citizens for Better Medicare. Citizens for Better Medicare, which turned out to be the largest interest group financier of Electioneering Communications in the 2000 election, is an organization representing certain pharmaceutical manufacturers.

That would have been the BCRA universe:[15] 59,632 broadcasts financed by 35 interest groups at an estimated cost of $40,491,141.[16]

[15] That is, the BCRA universe revealed by the CMAG data, which covers television markets serving 80 percent of the nation's population. No comprehensive information is available for the balance of the markets or for ads airing on local cable stations, but based on my familiarity with political advertising I would estimate that there are few additional organisations which spent more than $10,000 on political advertising in 2000.

[16] In Table 4, there are 60,623 ads listed as aired within 60 days mentioning a candidate. The difference between that number and the 59,632 listed above and in Table 3 is due to the existence of ads for which the interest group sponsors were unclear.

Table 3:
Interest Group Broadcasts of Electioneering Communications as Defined by BCRA (Ads Which Mention a Candidate and are Broadcast Within 60 days of the Election) in the 2000 Election

Organization	Cost	Airings
Citizens for Better Medicare	$6,615,826	10,753
Chamber of Commerce	$5,480,846	7,574
Planned Parenthood	$5,340,506	5,916
AFL-CIO	$5,142,962	9,779
Women Voters: A Project of Emily's List	$3,635,178	2,645
[15] Americans for Job Security	$2,826,989	5,007
Business Round Table	$2,685,977	4,571
Handgun Control	$ 1,793,938	2,887
Sierra Club	$ 1,112,387	1,707
League of Conservation Voters	$ 900,601	1,705
Americans for Quality Nursing Home Care	$ 803,195	980
Right to Life Committee	$ 707,660	601
Voters for Choice	$ 699,024	683
American Medical Association	$ 477,077	543
Emily's List	$ 443,120	800
Campaign for a Progressive Future	$ 410,983	863
Coalition for Future American Workers	$ 241,001	172
NAACP	$ 212,106	461
National Rifle Association	$ 205,609	333
National Education Association	$ 179,601	511
Citizens for Better America	$ 137,337	72
Clean Air Project	$ 127,602	191
National Association of Realtors	$ 91,468	210
American Seniors, Inc.	$ 65,607	111
Associated Builders and Con-	$ 39,428	95

tractors		
NARAL	$ 35,367	66
Americans for Limited Terms	$ 26,699	195
Federation for American Immigration Reform	$ 25,718	81
Americans for Victory Over Terrorism	$ 7,782	8
US Term Limits	$ 5,702	37
Conservative Leadership PAC	$ 5,531	10
National Pro Life Alliance	$ 4,338	24
Young Conservative Voters	$ 2,429	16
West Virginians for Life	$ 1,326	24
Right to Work Committee	$ 221	1
TOTAL	**$40,491,141**	**59,632**

VIII. The Magic Words Test Fails to Identify Political Advertisements That Have the Purpose or Effect of Supporting a Candidate for Political Office

The vast majority of political ads broadcast on television fall into one of two distinct categories. Some plainly have the main purpose of persuading citizens to **[16]** vote for or against a particular candidate. Other ads have the purpose of seeking support for or urging some action on a particular policy or legislative issue.

Heretofore, the "magic words" test—derived from a footnote in the Supreme Court's 1976 decision in *Buckley v. Valeo*—has been the legal standard for distinguishing between the two types of ads. This test defines express advocacy (ads with an election goal) as advertisements that contain words such as "elect," "defeat" or "support." Ads that do not contain magic words are technically not election ads under this test. Is this test effective?

As candidate sponsored ads are paid for by hard money and clearly fall within the realm of partisan electioneering, the magic word test does not apply to them. Still, precisely because all advertisements sponsored by candidates are electioneering by definition, they can provide a test for the current standard of express advocacy. If the use of magic words provided an accurate way to classify an ad, then advertisements clearly and obviously created and aired to influence elections would be expected to employ such magic words.

Of the 433,811 ads broadcast by candidates, 11.4 percent contained the magic words. Just under nine in ten (88.6 percent) of candidate ads in 2000, unarguably examples of partisan electioneering, were technically undetected by the *Buckley* magic words test and would not have been classified as electioneering. The data from 2000 demonstrate that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue.

[17] IX. Interest Group Financed Television Ads Which Mention a Candidate Are Concentrated Within 60 Days of an Election.

The two primary criteria by which BCRA defines Electioneering Communications are the ads' reference to a candidate and the proximity in time of their broadcast to the election. The CMAG database provides empirical evidence of a strong positive correlation between these two BCRA criteria and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office.

As Table 4 demonstrates, interest group ads that mention or depict a candidate tend to be broadcast within 60 days of the election. Interest group ads that do not mention a candidate tend to be spread more evenly over the year. More specifically, 78 percent of interest group ads that mentioned a candidate for federal office were broadcast within 60 days of the election. Fully 85 percent of interest group ads mentioning a presidential candidate ran within 60 days of the general election. By contrast, only 18 percent of interest group fi-

nanced ads not mentioning a candidate were broadcast within 60 days of the election.

Similarly, the distribution over time of interest group ads mentioning candidates is closely correlated to the distribution of electioneering communications broadcast by candidates and political parties.

As illustrated in Table 4, 76 percent of all interest group sponsored ads that mentioned a House candidate were broadcast within 60 days of the House of Representatives election, as were 79 percent of candidate ads and 94 percent of political party ads. Similarly, in the Senate election, 74 percent of interest group ads that **[18]** mentioned a candidate aired within 60 days of the election, as did 67 percent of candidate ads and 81 percent of political party ads.

Amended Expert Report of Kenneth M. Goldstein

* * *

[19]

Table 4: Advertising Activity by Interest Groups, Parties & Candidates in 2000

			Sponsor Type					
	Approximate Cost	**Total Number***	**Candidate**		**Party**		**Interest Group**	
All Political Ads	$624,218,204	838,169	433,811		230,368		133,335	
Within 60 Days	$404,208,353	538,404	275,281	63%	152,084	66%	70,384	53%
Outside 60 Days	$220,009,851	299,765	158,530	37%	78,284	34%	62,951	47%
Ads Not Referring to Any Federal Candidate	$42,923,204	57,888	1,558		508		55,648	
Within 60 Days	$8,109,047	11,361	1,066	68%	360	71%	9,761	18%
Outside 60 Days	$34,814,157	46,527	492	32%	148	29%	45,887	82%

Ads Referring to a Federal Candidate	$581,295,000	780,281	432,197		229,860		77,687	
Within 60 Days	$396,099,306	527,043	274,159	63%	151,724	66%	60,623	78%
Outside 60 Days	$185,195,694	253,238	158,038	37%	78,136	34%	17,064	22%
Ads Referring to a Presidential Candidate	$205,603,871	300,959	115,352		123,517		23,850	
Within 60 Days	$110,254,205	161,257	44,035	38%	58,784	48%	20,198	85%
Outside 60 Days	$95,349,666	139,702	71,317	62%	64,733	52%	3,652	15%
Ads Referring to a Senate Candidate	$216,422,636	239,891	171,713		52,953		13,583	
Within 60 Days	$149,622,206	169,971	115,432	67%	42,898	81%	9,999	74%
Outside 60 Days	$66,800,430	69,920	56,281	33%	10,055	19%	3,584	26%
Ads Referring to a House Candidate	$159,263,459	239,416	145,132		53,390		40,239	
Within 60 Days	$136,217,861	195,800	114,692	79%	50,042	94%	30,411	76%
Outside 60 Days	$23,045,598	43,616	30,440	21%	3,348	6%	9,828	24%

**Ads in "total number" column do not equal sum of sponsor type because the identity of a small number of ad sponsors could not be determined and coordinated expenditures are excluded.*

[20] X. Interest Group Sponsored Television Ads Which Mention a Candidate Are Concentrated in Competitive Districts

The CMAG database shows that interest group financed television ads that mentioned a candidate and were broadcast within 60 days of an election were highly concentrated in states and congressional districts with competitive races. As shown in Table 5, during the 2000 senatorial elections, 89.2 percent of such interest group ads ran in states where the race was competitive.[17] Four states accounted for 77 percent of the ads broadcast by interest groups; political parties broadcast 65 percent of their ads in these four states. Interest group ads were particularly important in Michigan, where interest groups broadcast 22 percent of the total ads broadcast in the race.

[21] Table 5:
Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 2000 Senate Races[18]

Senate Race in which Candidate I mentioned	Interest Groups		Political Parties		Candidates	
Michigan*	3,939	41%	6,114	14%	7,934	8%
Virginia*	1,651	17%	9,622	22%	11,354	11%
Washington*	1,094	11%	1,903	4%	8,370	8%
Florida*	661	7%	10,776	25%	11,492	11%
Rhode Island	434	5%	1,008	2%	2,692	3%
Missouri*	398	4%	2,695	6%	5,400	5%

[17] In determining which races were competitive, I relied on my professional judgment, as informed by various media sources such as the Cook Report, attached here as Appendix H.

[18] Table includes only those states in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Kentucky	384	4%	0	0%	0	0%
New Jersey*	348	4%	0	0%	6,463	6%
Delaware*	254	3%	787	2%	1,235	1%
Nebraska*	180	2%	3,000	7%	3,025	3%
Utah	123	1%	0	0%	597	1%
Pennsylvania	78	1%	1,978	5%	6,823	7%
New Mexico	38	0%	0	0%	722	1
Minnesota*	16	0%	652	2%	3,672	4%
Wisconsin	9	0%	204	0%	2,776	3%
Nevada*	7	0%	1,305	3%	2,500	2%
Georgia	0	0%	722	2%	1,550	2%
Indiana	0	0%	136	0%	2,507	2%
New York*	0	0%	1,966	5%	22,357	22%
TOTAL	**9,614**	**100%**	**42,868**	**100%**	**101,469**	**100%**

** Competitive races.*

The geographical distribution of interest group ads in Senate elections closely paralleled that of the political parties, which ran 90.6 percent of their ads in those competitive states. The same was true in House elections. As demonstrated in Table 6, during 2000, 85.3 percent of interest group financed ads broadcast within 60 days of the election were aired in congressional districts with competitive elections. Similarly, the political parties ran 98.2 percent of their ads in those districts.

[22] In certain key congressional districts, such as California 49 and North Carolina 8, interest groups broadcast more ads than candidates or the political parties. In 22 congressional districts, interest group ads exceeded the number of ads run by the political parties. Overall, interest groups aired 17 percent of all ads aired in races for the U.S. House of Representatives.

Table 6:
Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 2000 House Races[19]

House Race In which Candidate Is mentioned	Interest Groups		Political parties		Candidates	
California 49*	3,133	10%	1,852	4%	2,012	3%
Kentucky 3*	3,112	10%	1,755	4%	3,477	5%
Kentucky 6*	2,175	7%	2,809	6%	3,182	4%
North Carolina 8*	2,129	7%	2,398	5%	1,457	2%
Arkansas 4*	2,084	7%	2,092	4%	1,693	2%
New Mexico 1*	1,784	6%	617	1%	2,167	3%
Washington 5*	1,755	6%	1,646	3%	1,822	2%
Pennsylvania 10*	1,430	5%	1,881	4%	3,481	5%
Florida 22*	1,169	4%	1,413	3%	3,579	5%
New Hampshire 2*	1,076	3%	130	0%	1,073	1%
Michigan 8*	1,001	3%	2,572	5%	2,794	4%
Florida 23	916	3%	0	0%	0	0%
Minnesota 6*	720	2%	687	1%	2,085	3%
Texas 12	568	2%	0	0%	0	0%
California 20*	548	2%	1,424	3%	2,438	3%
Ohio 12*	539	2%	926	2%	2,252	3%
Colorado 1	432	1%	0	0%	0	0%
South Carolina 1	423	1%	0	0%	0	0%
Florida 8*	371	1%	2,405	5%	1,245	2%
Nevada 1*	336	1%	752	2%	2,048	3%
Washington 2*	322	1%	1,321	3%	1,063	1%
Pennsylvania 4*	316	1%	1,817	4%	987	1%
New Jersey 7*	310	1%	354	1%	580	1%
Virginia 4	310	1%	0	0%	0	0%
Connecticut 5*	306	1%	393	1%	2,217	3%
Nebraska 1	267	1%	0	0%	0	0%

[19] Table includes only those districts in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Georgia 9	262	1%	0	0%	0	0%
Virginia 1	261	1%	0	0%	0	0%
Minnesota 4*	247	1%	173	0%	964	1
Wisconsin 9	229	1%	0	0%	0	0%
Florida 12*	194	1%	1,409	3%	1,742	2%
Indiana 8*	178	1%	406	1 %	0	0%
Alabama 3	177	1%	0	0%	0	0%
Wisconsin 6	152	1%	0	0%	872	1%
Utah 2*	151	1%	2,104	4%	2,057	3%
Texas 25*	143	0%	186	0%	937	1%
North Carolina 11*	138	0%	1,033	2%	2,187	3%
Oklahoma 6	119	0%	0	0%	504	1%
Tennessee 6	117	0%	0	0%	419	1
Missouri 3	111	0%	0	0%	2,514	3%
Rhode Island 2	109	0%	0	0%	923	1%
Arizona 3	98	0%	0	0%	0	0%
Iowa 5	81	0%	0	0%	0	0%
Colorado 6	40	0%	0	0%	1,387	2%
Missouri 2	7	0%	359	1%	556	1%
Arkansas 3	0	0%	99	0%	0	0%
California 10	0	0%	41	0%	0	0%
California 15*	0	0%	668	1%	7	0%
California 27*	0	0%	626	1%	268	0%
California 36*	0	0%	1,062	2%	618	1%
Connecticut 2*	0	0%	537	1%	2,046	3%
Florida 3*	0	0%	794	2%	696	1%
Florida 4	0	0%	179	0%	168	0%
Illinois 10*	0	0%	861	2%	902	1%
Kansas 3*	0	0%	1,518	3%	2,159	3%
Kentucky 1	0	0%	52	0%	0	0%
Minnesota 2*	0	0%	44	0%	761	1
Missouri 6*	0	0%	2,381	5%	1,110	1%
New Jersey 12*	0	0%	1,317	3%	369	0%
New York 1	0	0%	181	0%	364	0%
New York 2*	0	0%	675	1%	136	0%
Oklahoma 2*	0	0%	1,729	3%	2,197	3%
Pennsylvania 13*	0	0%	278	1%	740	1%

Virginia 2*	0	0%	125	0%	2,343	3%
Washington 1*	0	0%	427	1%	1,550	2%
West Virginia 2*	0	0%	1,534	3%	3,787	5%
TOTAL	*30,346*	*100%*	*50,04*	100%	*76,93*	*100*

**Competitive Races*

[24] The CMAG database provides strong evidence that the interest group ads covered by BCRA are targeted at competitive electoral contests and closely parallel political party ads in their geographic distribution.

XI. Coders' Perceptions of Interest Group Television Ads as Electioneering Communications Proves that BCRA Captures Ads Which Have The Purpose or Effect of Supporting Candidates

Another useful perspective on BCRA's definition of Electioneering Communications emerges from the coders' assessments of the political television advertisements as being either "Genuine Issue Ads" or "Electioneering Ads." The coders were asked to classify the ads by reporting their perception of whether the purpose of an ad was to provide information about or to urge action on a bill or issue or to generate support or opposition for a particular candidate. Applying this criterion, the coders, working under my supervision, classified all political television ads broadcast by interest groups during 2000 as being either "Genuine Issue Ads" or "Electioneering Ads."[20]

[20] Specifically, coders were asked whether the purpose of the ad was to "generate support or opposition for candidate," or to "provide information or urge action." Coders were also given the option of "unsure/unclear."

Table 7:
Effect of BCRA on Interest Group Ads in 2000: Ads Perceived as Electioneering vs. Ads Perceived as Issue Advocacy

	Unique Ads	*Airings*	**Unique ads** *numerator*	*denominator*	**Airings** *numerator*	*denominator*
Perceived as Genuine Issue Ads	133	45,001				
Perceived as Electioneering	233	88,106				
% Genuine Issue Ads over calendar year that are captured by BCRA	4.51%		6	133	1413	45,001
% of ads captured by BCRA (60 days and candidate mention) that are Genuine Issue Ads	4.00%		6	154	1413	60,623
% of ads captured by BCRA/FECA (magic words or 60 days and candidate mention) that are Genuine Issue Ads	3.90%		6	158	1413	60,784

[26] The coders' perceptions provide evidence that BCRA's definition of Electioneering Communications accurately captures those ads that have the purpose or effect of supporting candidates for election to public office. As shown in Table 7, the coders classified 97.7 percent of the 60,623 interest group sponsored political television ads that mentioned a candidate and were broadcast within 60 days of an election as Electioneering Ads. Only six distinct ads, which were broadcast a total of 1413 times, were classified as Genuine Issue Ads.[21]

For the year 2000 as a whole, the coders classified 33.8 percent (45,001) of interest group sponsored political television ads as Genuine Issue Ads and 66.2 percent (88,106) as Electioneering Ads. The fact that 97.7 percent of interest group ads that would have been classified by BCRA as Electioneering Communications were coded as having the purpose of generating support or opposition for political candidates, coupled with the coders' classification of a third of all interest group financed political television ads broadcast during 2000 as a whole as Genuine Issue Ads, are persuasive evidence that BCRA would capture political television ads that have the purpose or effect of supporting or opposing the election of electoral candidates.

Conversely, there is persuasive evidence that the BCRA definition of Electioneering Communications is not over-

[21] The storyboards for these ads appear in Appendix J to this Report. These six ads represent every unique ad ever coded as a Genuine Issue Ad by the coders of the 2000 data. In some prior publications, fewer than six ads covered by BCRA were treated as Genuine Issue ads (see, e.g., *Buying Time 2000*, and "The Facts about Television Advertising and the McCain-Feingold Bills" by Jonathan Krasno and Kenneth Goldstein). In those publications, certain of these six ads—particularly those as to which there was disagreement among the student coders—were ultimately treated as electioneering. In fact, my own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate (the lone exception being the Feingold/Kohl Abortion Ad). However, in this report, I have chosen to take the most conservative approach and count all six as Genuine Issue Ads.

broad in the sense of applying to any **[27]** meaningful number of advertisements that are perceived as Genuine Issue Ads. Using the coders' classifications, only 3.1 percent of the 45,001 Genuine Issue Ads broadcast by interest groups during the 2000 election cycle would have been covered by BCRA.[22]

XII. Other Characteristics of the Ads Support The Coders' Classification of Ads as Genuine Issue Ads or Electioneering Ads

To the extent that the coders' classifications are supported by other characteristics of the ads suggesting that the ads had the purpose or effect of supporting the election of candidates for office, these characteristics provide corroborative evidence of the validity of the coders' classifications of the ads as Electioneering Ads and of the utility of the virtually congruent BCRA definition of Electioneering Communications as a test for identifying these ads that have the purpose or effect of supporting a candidate.

Electioneering Ads financed by interest groups are concentrated in the two months before the election. As shown in Table 8, during the first six months of 2000, interest groups broadcast 72 percent of their Genuine Issue Ads, but only 7 percent of their Electioneering Ads. During the first eight months of the year, interest groups broadcast 35,413 of 45,001, or 79 percent, of their Genuine Issue Ads, while airing only 24,773 of 88,106, or 28 percent, of their Electioneering Ads. During the three months preceding the election, interest groups broadcast 23 percent of their Genuine Issue Ads while airing 82 percent of their Electioneering Ads, 72 percent of which were broadcast within the 60 days leading up to the November 7, 2000 election day.

[22] In fact, this percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999.

[28] Table 8:
Distribution of Interest Group Sponsored Electioneering and Genuine Issue Ads During 2000 Election Cycle

Month	Electioneering Ad		Genuine Issue Ad	
January	549	1%	3,397	8%
February	1,129	1%	2,861	6%
March	2,000	2%	1,992	4%
April	707	1%	7,294	16%
May	933	1%	6,250	14%
June	751	1%	10,731	24%
July	10,067	11%	2,114	5%
August	8,637	10%	774	2%
September	13,009	15%	5,142	11%
October/November	50,324	57%	4,446	10%
TOTAL	**88,106**	**100%**	**45,001**	**100**

Interest group expenditures for Electioneering Ads in congressional races were heavily concentrated in districts where there were competitive electoral contests. Approximately 91 percent of interest group funded Electioneering Ads in the Senate general election were spent in competitive states ($9,079,235 out of $9,941,797).[23]

The same is true of interest group expenditures directed at elections for the House of Representatives. Using sources such as the Cook Report, I determined that 45 House races were competitive.[24] Interest group Electioneering Ads ran in 41 House races covered by CMAG's top 75 markets. Ninety-one percent of interest group Electioneering Ads aired in House races were aired in races deemed competitive by the Cook Report.

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[23] I used the Cook Report, attached as Appendix H, to identify the following senatorial elections as competitive races in 2000: Delaware, Florida, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Virginia and Washington.

[24] See Appendix H.

[29] Political television ads coded as Electioneering Ads differed in content from those perceived as Genuine Issue Ads overwhelmingly in two aspects. First, 85 percent of Electioneering Ads mentioned a candidate; only 15 percent did not. Conversely, 94.2 percent of Genuine Issue Ads did not mention a candidate while 5.8 percent did. Second, Electioneering Ads broadcast by interest groups tend to be overwhelmingly negative in tone, while Genuine Issue Ads are not. During 2000, 60 percent of all Electioneering Ads broadcast by interest groups attacked a candidate; 2.9 percent of interest group sponsored Genuine Issue Ads were negative in tone.

Finally, Genuine Issue Ads differed from Electioneering Ads with respect to their publication of toll-free telephone numbers: 62.4 percent of Genuine Issue Ads contained toll-free numbers; by contrast, only 13 percent of Electioneering Ads contained a toll-free number.

To summarize, the information relating to the content of the ads, their timing, and their geographic distribution strongly corroborates the coders' classification of the ads as Electioneering Ads or Genuine Issue Ads.

XIII. Issue Oriented Ads Broadcast by Interest Groups are Readily Distinguishable from Quintessential Political Ads

Interest group ads intended to inform the public concerning some issue, as opposed to supporting a candidate for elective office, are readily distinguishable. If we take interest group sponsored ads which do not mention or depict a candidate as a surrogate for quintessential issue oriented ads and compare them to ads sponsored by candidates or parties—a surrogate for quintessential electioneering ads—it becomes **[30]** readily apparent that issue oriented ads are markedly different with respect to timing, content, and coder perception.

First, as shown in Table 9, 63.5 percent of candidate ads and 66 percent of political party ads ran within 60 days of

election; only 17.7 percent of group sponsored issue oriented ads were broadcast during that period.

Second, 45.0 percent of political party ads were negative in tone, whereas only 0.7 percent of group sponsored issue oriented ads were negative in tone. During the 15 days prior to election, negative political party ads rose to 68.4 percent of all party ads broadcast. Almost 69 percent of BCRA-regulated group ads were negative in tone. Similarly, 65 percent of group sponsored issue oriented ads contained a toll-free number whereas less than one percent of candidate or political party ads did so. Only 2.1 percent of BCRA-regulated group ads contained a toll-free number.

Finally, viewers perceived 99 percent of candidate ads and 100 percent of party ads as intending to generate support or opposition for a candidate. While 99.7 percent of BCRA-regulated group ads were perceived as supporting or opposing a candidate, none of the issue oriented interest group ads were so perceived.

Table 9: Comparing Quintessential Electioneering Ads and Quintessential Issue Ads in the 2000 Elections

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=433,811)	Interest Group Ads with Magic Words (n=2,876)	Interest Group Ads with No Candidate (n=55,648)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=60,623)	Political Party Ads (n=230,368)
Candidate Mention					
% Naming Candidate	99.6%	100.0%	0.0%	100.0%	99.8%
Magic Words					
% Using Magic Words	11.4%	100.0%	0.0%	0.0%	2.2%
Timing					
% Run January through March	16.0%	0.0%	17.0%	0.0%	0.0%
% Run April through June	6.4%	10.6%	45.0%	0.0%	5.8%
% Run July through August	10.5%	15.3%	18.8%	0.0%	23.3%
% Run 60 Days Before General Election	63.5%	74.1%	17.7%	100.0%	66.0%
% Run 30 Days Before General Election	42.2%	51.0%	7.3%	72.9%	40.7%
% Run 15 Days Before General Election	26.0%	40.1%	4.3%	44.2%	25.5%
Information Provided					
% Giving Toll Free Number	0.7%	0.0%	65.0%	2.1%	0.5%
Viewer Perception					
% Perceived as Electioneering	99.0%	100.0%	0.0%	97.7%	100.0%
% Negative	12.3%	29.6%	0.7%	68.6%	45.0%
% Negative for Ads Run 60 Days Before General Election	15.3%	24.8%	2.7%	68.6%	53.7%
% Negative for Ads Run 30 Days Before General Election	18.2%	36.0%	3.7%	68.7%	58.2%
% Negative for Ads Run 15 Days Before General Election	19.7%	37.8%	1.3%	66.5%	68.4%

[32] XIV. Broadcasting Issue Ads Near an Election Is Not an Effective Way of Informing Voters or Generating Action on those Issues

One concern sometimes raised by those opposed to the BCRA regulations is that the restriction may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics. There is no reason to believe that BCRA would significantly hinder interest groups from effectively getting out their messages on public policy issues. Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases.

First, while there is evidence that interest in politics and *elections* rises as Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time.

Second, communication theory has concluded that advertising is likely to be most effective (at informing or persuading) when viewers are exposed to one-sided flows of information in isolation from other advertising. See William McGuire, "The Myth of Massive Media Impact: Savagings and Salvagings," *Public Communication and Behavior* 1:173-257 (1986); John Zaller, *The Nature and Origins of Mass Opinion* (Cambridge Univ. Press 1992). The last two months before an election is the time period of the most intense political advertising activity. In 2000, for example, 538,404 political ads, or 64.2 percent of all political ads run during the year, appeared during the last two months before an election. With the flood of advertising taking place during the last two months before an election, an individual interest group's message on a public policy issue is likely to become lost. *Id.*

Third, in conjunction with an increased interest in politics and elections, partisan attachments also harden during the last two months of a campaign. These hardened partisan attachments make it more difficult to persuade otherwise open-

minded **[33]** viewers of the merits of an interest groups' policy stance. Zaller, *Nature and Origins of Mass Opinion.*

In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year.

Data from my study supports the conclusion that interest groups themselves understand that airing Genuine Issue Ads near an election carries no special advantage, and that it makes strategic sense to spread the airing of these ads over the course of the entire year. Of ads run by interest groups that do not name any candidate—quintessential issue ads—17.7 percent of those run within 60 days before a general election (Table 9). This approximates the 16.4 percent of issue ads which would have run if the ads had been equally distributed throughout the year. The frequency of issue ad broadcasts exceeds an even temporal distribution only in the April-June time frame. Forty-five percent of all issue ads were aired then, as against an expected percentage of 25 percent if the ads were spread evenly throughout the year (Table 9). This concentration of ads during April through June is a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer. There is no concentration of these quintessential issue ads during the 60 days before a general election. This time—the most cluttered time for advertisements and a time with hardened partisan attachments—is probably the worst time for an interest group to educate the public on its particular issue.

[1 (DEV. 1-Tab 3)] **Report on The Bipartisan Campaign Reform Act**

Donald P. Green

A. Whitney Griswold Professor of Political Science

Yale University

September 23, 2002

Credentials

My name is Donald P. Green, Professor of Political Science at Yale University. I received my doctorate in political science from University of California, Berkeley in 1988 and have been teaching political science at Yale University since 1989. I was promoted to tenured professor in 1994. In 1996, I was appointed Director of Yale's Institution for Social and Policy Studies, an interdisciplinary policy center founded in 1968. I was recently reappointed for a third three-year term in this position. In 2001, I received an endowed chair.

My academic interests include elections, campaign finance, political parties, and public opinion. I have written extensively on each topic. My early work on campaign finance[1] used econometric models to gauge the effects of campaign expenditures on vote outcomes; more recently, my

[1] Green, Donald Philip and Jonathan S. Krasno. 1988. Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections. *American Journal of Political Science*. 32:884-907. Green, Donald Philip and Jonathan S. Krasno. 1990. Rebuttal to Jacobson's "New Evidence for Old Arguments." *American Journal of Political Science*. 34:363-372. Krasno, Jonathan S., Donald Philip Green, and Jonathan A. Cowden. 1994. The Dynamics of Campaign Spending in U.S. House Elections. *Journal of Politics*. 56:459-474.

work makes use of field experimentation to gauge the effectiveness and cost-efficiency of campaign tactics.[2] A long string of articles on [2 (DEV. 1-Tab 3)] parties, elections, and public opinion recently culminated in a book published by Yale University Press.[3]

Over the past 13 years, I have taught a variety of classes in the field of American politics and served as a reviewer for every major academic journal in this field. I have been a member of the American Politics section of the American Political Science Association since 1984 and have made scores of presentations at professional meetings and lecture series around the country. My scholarship won recognition from the National Science Foundation and substantial financial support from the Pew Charitable Trusts, Smith Richardson Foundation, Harry Frank Guggenheim Foundation, and Russell Sage Foundation.

I am being paid $150 per hour for my work on this case, plus expenses. During the past four years, I have testified as an expert in two cases, *California Prolife Council et al. v. Fair Political Practices Commission et al.* and *Daggett v. Webster*.

Introduction

The Bipartisan Campaign Reform Act of 2002 (hereafter BCRA) represents an attempt to close the loopholes that allowed vast and rapidly increasing sums of soft money to

[2] Gerber, Alan S., and Donald P. Green. 2000. The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment. *American Political Science Review* 94:653-63. Gerber, Alan S., and Donald P. Green. 2001. Do Phone Calls Increase Voter Turnout? A Field Experiment. *Public Opinion Quarterly 65:75-85.*

[3] Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters*. New Haven: Yale University Press.

flow unregulated through political parties to campaigns between 1980 and 2002. In contrast to hard money contributions, the size of which has long been limited by the Federal Election Campaign Act of 1974 (FECA), soft money donations were not subject to limits on the theory that they contribute to campaign activities, such as voter mobilization drives, that are intended only in part to aid in the election of federal candidates. In 1978, the Federal Election Commission (FEC) ruled that a state party could raise funds otherwise not permitted by FECA to defray a portion of administrative overhead, voter registration activities, and voter mobilization activities that benefit both state and federal candidates. In 1979, the FEC ruled that national party committees could [3 (DEV. 1-Tab 3)] accept donations that were otherwise prohibited by FECA in order to finance a component of campaign activity associated with a combined federal-state election. The net effect of these rulings was to open the door to unlimited donations to parties by corporations, unions, PACs, and individuals. So long as the money was spent on nonfederal election activity or transferred to the nonfederal accounts of state parties, where it might be spent on state or joint state/federal activity, these funds were not limited by the federal regulatory regime established under FECA. The BCRA may be regarded as an attempt by Congress to reassert control of an increasingly dysfunctional regulatory regime. The Act comes to grips with a fact that political parties learned long ago, namely, that funding for state and local parties has implications for federal elections.

In the years leading up to the passage of the BCRA, political parties and donors grew increasingly adept at exploiting the soft money loophole. It has been estimated that during the 1999-2000 election cycle soft money donations to the national parties totaled $495 million. A staggering figure of approximately $300 million, or 60% of these soft money

donations, came from just 800 individuals, labor unions, corporations, or groups of executives associated with corporations.[4] Whereas soft money constituted just 16% of the money contributed to the national political parties in the 1991-1992 election cycle, by 1999-2000, soft money accounted for 40% of all the money donated to the national parties. Although donations remained subject to disclosure requirements, a large fraction of the money flowing to national parties was now outside the system of contribution limits established under FECA.

In early 2002, campaign finance legislation, which had been stalled in Congress for years, came to the forefront of the national agenda. Like the federal campaign finance laws that came before it, the BCRA was propelled to enactment by a wave of financial and accounting scandals among large corporations, entities whose executives made lavish donations to both political parties and enjoyed much-publicized access to policy makers at the highest levels of government. Faced with an electorate that was becoming [4 (DEV. 1-Tab 3)] increasingly restive about revelations concerning massive corporate, labor, and individual contributions to parties working in close conjunction with candidates for federal office, Congress and the President enacted the BCRA.

The BCRA's regulatory regime contains, among other things, a series of provisions designed both to close the soft money loophole and to forestall attempts to circumvent the new regulatory system. First, the national party committees may no longer accept soft money. Second, the BCRA does not permit federal candidates or officeholders to raise or

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[4] Holman, Craig B., and Luke P. McLoughlin. *Buying Time: Television Advertising in the 2000 Federal Election*. New York: Brennan Center for Justice.

transfer funds unless those funds are subject to FECA as amended by the BCRA. Third, the BCRA requires that state and local political parties comply with FECA contribution limits insofar as the money that they raise goes to fund "federal election activity," which includes voter registration drives during the 120 days leading up to a federal election, voter mobilization activity conducted in connection with a federal election, mass communication that promotes or attacks a federal candidate, and the services of state or local employees who devote more than 25% of their time to campaign activities associated with a federal election.[5] Fourth, the BCRA prohibits the national and state parties from transferring funds to certain tax-exempt organizations that engage in electoral activity. These tax-exempt organizations include 501(c) organizations that engage in federal election activity as well as so-called Section 527 organizations other than political committees, sub-national parties, or sub-national campaign committees. Taken together, these provisions prevent parties and donors from circumventing the hard money limits on campaign contributions to federal candidates.

Critics of the BCRA have leveled three principal constitutional objections. They argue that these contribution limits: (1) restrict their First Amendment rights of expression and association, by restricting how funds may be contributed and used, (2) undermine principles of federalism, insofar as the new federal regulations impose new restrictions on state political parties, and (3) violate the principle of Equal

[5] The Levin Amendment provisions in Section 323(b)(2) allow subnational parties to use soft money to pay for a portion of certain federal election activities, so long as the money is raised by the subnational party making the expenditure in increments no greater than $10,000. "Levin funds" may be used only for those federal election activities that neither mention federal candidates nor involve broadcast media.

Protection, in [5 (DEV. 1-Tab 3)] that political parties are subject to regulations that are not applied to individuals, political action committees, corporations, and labor unions. Any such concerns must be weighed against the very real prospect that failure to regulate soft money donations will result in the actual or apparent corruption of public officials and undermine the legitimacy of our political system in the eyes of the electorate.

The Supreme Court's previous decisions have indicated that the regulation of campaign contributions, as distinct from campaign expenditures, represents an acceptable burden on First Amendment freedoms so long as the legislation addresses the problem of corruption inherent in a system in which actual and potential officeholders receive large sums of money from campaign contributors. When using the term corruption, the Court refers not only to quid pro quo exchanges of money for favors but also the indirect influence that actual or anticipated donations have on the judgment and behavior of officeholders. Moreover, the Court has recognized that the problem of corruption extends beyond the discovery of specific instances of improper influence to include both the threat of corruption and the electorate's perception that large campaign contributions corrupt public officials. The BCRA's restrictions on political parties are justified precisely because they address the reality, threat, and perception of corruption that grows out of a system of unregulated soft money donations.

This argument applies not only to national party committees but also to state and local parties engaging in activities that affect federal elections. If it is to be effective in reining in the kinds of large campaign donations that have a potentially corrupting influence on federal candidates and office-holders, the BCRA must regulate political parties in a comprehensive way. Parties are adaptable, vertically inte-

grated institutions. To eliminate from the BCRA those provisions that affect subnational parties would be to ignore the many ways in which state and local parties affect federal campaigns and to invite political parties to restructure themselves so as to make subnational parties conduits for money flowing to federal campaigns. The state parties that would be the most attractive proxies would be precisely those that are subject to the weakest statewide regulatory oversight and the fewest safeguards against corruption.

[6 (DEV. 1-Tab 3)] This report is organized into six sections. I begin by describing the special attributes of political parties within our system of political institutions and their unique relationships with federal officeholders and candidates. These attributes and relationships set them apart from other political actors (e.g., PACs, labor unions, individual donors) that Plaintiffs complain are subject to less regulatory scrutiny under the BCRA. The second section of this report discusses the nexus between national and state parties and between state parties and federal officials, arguing that a combination of institutional and informal connections between them help explain the ease with which they have coordinated their activity in the past, a pattern that would continue in the future were they given the opportunity to circumvent the new regulatory system. The third section discusses other circumvention tactics, such as co-opting tax-exempt organizations. The fourth section explicates the meaning and measurement of corruption in the political system. The fifth section describes the evolution of political parties and electoral competition over the past few decades, devoting special attention to the rise of capital-intensive campaigning and the risk of corruption that it engenders. The final section debunks the notion that political parties or the functions that they perform will be adversely affected by the BCRA provisions at issue here, namely, the restrictions on

campaign contributions made to local, state, and national political parties supporting generic voter mobilization activities.[6]

This report's recurrent theme is that parties are highly adaptable strategic actors. Notwithstanding their resistance to laws that restrict their ability to solicit and transfer large donations, parties will quickly adjust to the new incentive system created by BCRA, for example, by broadening their base of contributors. But it is the parties' very adaptability that poses a serious danger to the political system should provisions that limit the contributions that state parties may accept in order to finance federal election activity be struck down. Political parties are flexible, multi-tiered organizations that are structured in ways that are designed to win power. Regulations directed at them must [7 (DEV. 1-Tab 3)] take into account the many institutional, social, and ideological interconnections among local, state, and national party organizations, because a narrow regulatory strategy that focuses solely on the national parties would encourage political parties to reorganize their financial activities in ways that circumvent the new restrictions. The BCRA creates a comprehensive regulatory system covering activity that bears directly on the election of federal candidates; if the BCRA is undercut in ways that permit back-door financing of federal campaigns, one can be certain that these loopholes will be exploited.

I. Special Attributes of Parties

Political parties, it is often noted, are nowhere mentioned in the Constitution, Bill of Rights, or subsequent Amend-

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[6] In this report, I discuss issues related to the BCRA's regulation of political parties, as opposed to its electioneering communications provisions.

ments.[7] The Founders saw no reason to elevate political parties to a special or protected status within the framework of Constitution. Hostile though the Founders were to political parties and the factionalism they embodied, political parties have nevertheless come to play a ubiquitous role in our system of governance and in the careers of public officials.

Even an abbreviated list of the functions of parties is impressively long.[8] In most state and federal elections, parties-as-organizations structure the lists of candidates that are presented to voters. To varying degrees, but with increasing probability as the prestige of the office increases, candidates for public office are recruited, endorsed, and financed by political parties. Federal candidates in particular must pass through a sieve of party caucuses or primaries in order to appear on the general election ballot with the mantle of a political party beside their names. Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power. Political parties [8 (DEV. 1-Tab 3)] organize the legislative caucuses that make committee assignments. Power within each committee and subcommittee is distributed according to political party, with the majority party enjoying special

[7] The Founders were suspicious of organized political parties, and even after the Federalist and Democratic Parties took root, the text of the Constitution remained blind to them. Even the Twelfth Amendment, which could have mentioned parties in its description of how the Electoral College would cast ballots after the debacle of 1800, did not do so.

[8] Because the functions of political parties are so variegated, political scientists have long made use of a tripartite distinction when characterizing them. The *party-in-government* administers the state and structures the leadership hierarchies within state institutions; the *party-as-organization* competes in elections; and the *party-in-the-electorate* provides its base of electoral support.

procedural prerogatives and staffing resources. When lawmakers or their critics attract media attention, the news is reported to the party-in-the-electorate with reference to the party affiliation of the people involved.

The scope and power of political parties undercuts the complaint that the BCRA unfairly singles out political parties and treats parties differently from individuals, political action committees, corporations, and labor unions. Political parties play a distinctive and in many ways privileged role. Other entities are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership. Other entities do not enjoy de facto apportioned representation on the Federal Election Commission, which as a matter of practice comprises three Democrats and three Republicans. Even the largest political action committees cannot begin to approach the political scope, influence, or depth of electoral support characteristic of the Republican or Democratic Parties.

The prominence of political parties in both electoral and legislative institutions is not accidental.[9] In order to obtain power, a party must win elections; and in order to win elections, elected officials scramble to claim credit for good legislative deeds while publicizing the misdeeds of the

[9] Despite the Founders' aversion to parties, parties quickly formed as a device to advance shared political objectives. By the 1820s, parties emerged as mass organizations designed to mobilize a geographically-dispersed and enlarged electorate. Parties solve important problems for politicians. They provide a way to mobilize and engage voters, to channel ambition (by providing career ladders and nomination procedures), and to facilitate legislative coalition-building. Parties thrive because they are deeply rooted in the incentive system created by our political institutions, and these basic incentives are scarcely affected, if at all, by the BCRA.

opposition party.[10] Accordingly, parties loom large in the careers of professional politicians. Elected officials frequently emerge from the ranks of [9 (DEV. 1-Tab 3)] local activists and legislative aides. In order to win a place on the general election ballot, they must prevail in a party caucus or primary. (Since many elected officials gain office only after multiple attempts, the relationship between candidates and parties frequently goes back many years.) To locate donors and activists who might help them with their general election campaigns, these candidates must typically build a cordial relationship with party leaders—all the more so if candidates hope to secure direct campaign support from the parties or from prominent figures within the party. To be sure, many famous or wealthy candidates in recent years have been able to win party nominations with little or no political experience or party connections, but once elected they discover the importance of parties in advancing their legislative goals, facilitating their reelection, or satisfying their ambitions for higher office.

As political scientists have observed since the earliest studies of political party machines, there is often a disquieting closeness between the party-in-government and the party-as-organization. Modern day politicians no longer measure their influence by the patronage jobs they wield, but they remain apt fundraisers, and their access to donors makes them important assets to any campaign organization.

[10] Reflecting the decentralized nature of our geographically based first-past-the-post electoral system, American political parties tend not to publicize broad ideological causes that might impair a given legislator's ability to campaign effectively in his or her home state. Their energies are devoted primarily to the practical challenges of winning electoral majorities. In some cases, legislative parties directly determine electoral outcomes, as in the case of party-line votes that determine the outcome of disputed elections.

Presidents and congressional leaders are favorite guests at fundraising affairs. Although fundraising is scarcely their favorite pastime, they fully recognize that their fundraising role both augments their power within the party-as-organization by lengthening the list of public and party officials who owe them favors and indirectly strengthens their power within the party-as-government by increasing the number of offices their party controls. As I shall point out below when summarizing recent scholarship on campaign finance, donations flow most vigorously to those in powerful official positions.

Political parties, it should be noted, are structured along very different principles from the American government. One such principle is the separation and dispersal of power, of which one finds many examples in the Constitution. Article I, Section 6 forbids federal legislators from simultaneously holding other offices.[11] Article II, Section [10 (DEV. 1-Tab 3)] 1 forbids federal legislators from appointment to the Electoral College.[12] Federal lawmakers thus constitute a distinct group from state officeholders; federal legislators, from officers in the federal executive branch, and so on. By contrast, political parties allow and even encourage the overlap between state and national officeholding. Indeed,

[11] Article I, section 6: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office."

[12] Article II, section 1: "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Plaintiffs complain that the BCRA would impinge upon their ability to automatically appoint the leaders of statewide parties to national party committees. Leaders of legislative party caucuses may also serve as members or leaders of party campaign committees. Furthermore, party leaders are drawn disproportionately from the ranks of those who hold important legislative leadership posts. When I later consider the threat of corruption posed by unrestricted contributions to political parties, it must be remembered that the internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the Republican Senatorial Campaign Committee from 1995-97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee. Parties, in contrast to the lawmaking institutions they inhabit, are organized in ways that concentrate authority, entrusting multiple roles to particular individuals.

II. State Parties, National Parties, and Federal Officeholders: Links that Structure the Scope of the BCRA's Regulatory Purview

In the preceding section, I discussed the unique attributes of political parties and their relationships with federal officeholders and candidates. In this section, I consider the relationship between state and local parties on the one hand and national parties and federal officials on the other. My aim is to underscore both the extensive institutional and informal links between national and subnational parties and the many ways that the behavior of subnational parties affects the fortunes of federal officials.

[11 (DEV. 1-Tab 3)] Although state and national parties are distinct institutions, rarely in American history have state and national political parties been in serious conflict, and even more rarely have state parties seen it in their interests to withdraw their support from the national presidential nominee.

This pattern should hardly be surprising, since one of the strands that links local, state, and national partisans is a deep sense of attachment to the political party to which they belong. Although there is often speculation that activists and voters feel a sense of attachment to their state parties that they do not feel toward the national party, survey evidence from the 1950s to the present demonstrates that split party attachments are unusual.[13] Local and state partisans want to see their team win federal office, and with good reason. National and subnational partisans generally share similar ideological and programmatic visions. Even when they disagree, subnational partisans recognize that federal officeholders and the resources they command can be enormously beneficial to state and local parties and candidates.

The links between state and national parties run deeper than an overlap in personnel and we-feeling, important though these may be. Indeed, the links run deeper than the informal social ties that state and national party members often share with their constituents and donors or the string of political connections that former state party leaders accumulate when they ascend to leadership positions in national political parties.[14] The American political system ties the fortunes of state legislators and U.S. House members through the institutional mechanism of redistricting. The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances

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[13] On this point, see Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds*. New Haven: Yale University Press.

[14] Two of the many examples that could be adduced include Ann L. Wagner, Co-Chairman of the RNC and Chairman of the Missouri Republican Party, and Joe Carmichael, Vice-Chair of the DNC and Chair of the Missouri State Democratic Party.

that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

[12 (DEV. 1-Tab 3)] For example, in early 1999 the Republican National Committee, recognizing that state legislatures in Tennessee and Georgia would soon control redistricting, transferred substantial sums of money to those states' Republican parties in an effort to win the few seats necessary to gain the majority. As Edwin Bender, in a report for the National Institute on Money in State Politics explains: "In a number of states with legislatures that are controlled by narrow margins, a win or two in the state House or Senate in 2000 could mean the difference between a redistricting committee controlled by Democrats or Republicans, and districts that favor one party over the other. . . . As a result, national party organizations have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process."[15]

Given the overlapping structure of officeholding in national, state, and local parties and the special incentives for federal officeholders created by redistricting, the regulatory environment created by the BCRA must encompass national, state, and local parties. The importance of primary election challenges to federal officeholders who inhabit districts with lopsided proportions of their fellow partisans coupled with the possibility that federal officeholders or their allies might make a bid for statewide office means that federal officials

[15] Bender, Edwin. 2000. States, Redistricting, and Election 2000. The National Institute on Money in State Politics.

cannot afford to be out of favor with the political party of their home state.

The scope of the BCRA makes even more sense when one considers the many informal interactions between federal officeholders and state political parties. State parties and federal officeholders, after all, tend to have longstanding political relationships that not infrequently assign an important party fundraising role to federal officeholders. Federal officeholders and their allies often figure prominently within state parties. State parties and federal officeholders share many of the same campaign donors. State parties have no shortage of favors to ask of federal office-holders on behalf of important donors; federal office-holders in turn have considerable incentives to accede to or anticipate these requests, particularly since many of them aspire to higher office or aim [13 (DEV. 1-Tab 3)] to bequeath their seats to their allies or offspring. To exclude state and local parties from the purview of federal legislation ignores the many points of intersection between national parties and their subnational comrades in arms.

What justification is there for regulating the funding of federal and generic election activity of state parties in the context of federal elections? First, state and local parties play a direct role in the electoral campaigns of federal candidates. The appeals that state and local parties make to voters and funders frequently mention both federal and nonfederal candidates, particularly when presidential candidates or contested U.S. Senate seats are at stake. The reasoning behind this tactic is easy to discern. In addition to the economies achieved when multiple candidates are presented to voters, designers of campaign literature recognize that voters are

often more interested in federal races than they are in state legislative races.[16]

What about state and local party communications that make no mention of federal candidates? Because the partisan proclivities of the electorate express themselves toward *both* state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office. Consider, for example, the immense correlation between voting for state and federal offices in California, a state that maintains a database of how each vote on each ballot was cast. UCLA Professor Jeffrey B. Lewis assembled these data for the 1992 election using ballots cast in Los Angeles County. That election featured a U.S. Senate contest between Barbara Boxer, the Democratic candidate, and Bruce Herschensohn, the Republican candidate. The individual-level ballot data enable us to say precisely what proportion of voters who cast Democratic or Republican ballots for state legislative office voted for Boxer, who won with a plurality of 48%. Those who voted for a Republican state senate candidate were 5.6 times more likely to vote for Herschensohn than Boxer (531,081 vs. [14 (DEV. 1-Tab 3)] 95,675); those who voted for a Democratic assembly candidate were 5.9 times more likely to vote for Boxer than Herschensohn (600,373 vs. 101,590). No less striking patterns of party voting obtain regardless of

[16] The even-year federal elections mandated by the Constitution dominate the political landscape, particularly in presidential election years. By my calculation, the presence of a presidential candidate on the general election ballot raises statewide voter turnout by an average of 17 percentage-points over the period 1960-2000. (Voter turnout was calculated as number of voters divided by the size of the voting-age electorate, as measured by *America Votes* and *Statistical Abstract of the United States*.) Thus, a sizable fraction of all voters who cast ballots in joint state/federal elections show up precisely because there is a federal candidate on the ballot.

which state and federal offices one examines. For example, among the 2,159,164 voters who cast a ballot for a Democratic or Republican state assembly candidate, 86.4% cast ballots for the same party when voting for U.S. House candidates.

These findings undercut the argument that funding for voter mobilization activity lies beyond the scope of federal authority because it does not directly involve federal candidates.[17] The evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal

[17] This argument rekindles a time-honored tradition of using voter mobilization campaigns as a Trojan horse to open loopholes for partisan campaign spending; the original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Javish Shean (2001, p. 3), 8.5% of national party soft money expenditures went to "mobilization" and "grassroots." The figures for state and local parties are each 15%. La Raja, Ray, and Elizabeth Jarvis-Shean. 2001. Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation. Although the details of their classification scheme cannot be discerned from their paper, it seems likely that they have, if anything, overestimated spending on mobilization, since much of what parties and consultants call "get-out-the-vote" activity is direct mail or phone calls designed to call attention to particular issues or candidates. Such expenditures could fairly be classified along with other forms of mass communications aimed at persuading voters.

candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off[18] among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

[15 (DEV. 1-Tab 3)] When considering the overlap between state and federal elections, it should be remembered that states at their discretion choose whether to hold their elections at the same time as federal elections. New Jersey and Virginia, for example, choose to hold their state elections during odd-numbered years. Against the argument that states are unable to change the timing of their elections is the fact that states in recent decades have changed the timing of their gubernatorial elections, so that they no longer coincide with presidential elections and the "coat-tails" associated with presidential victories. Indeed, in their complaint the California Democratic and California Republican Parties acknowledge that they exercise this discretion when they point out that California deliberately holds its elections so as to maximize voter turnout while minimizing administrative costs.

Thus, it is entirely reasonable that the BCRA prevents national parties from funneling soft money to subnational elections, whether on behalf of state candidates or to pay for voter mobilization or generic campaign activity. These activities have direct implications for the election of federal officials.

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[18] Roll-off refers to instances in which voters cast ballots for the prominent offices at the top of the ticket but do not cast ballots for lower offices.

Even if one were hypothetically to identify a component or target of subnational election activity that had no bearing whatsoever on the election of federal officials, one should not lose sight of the potential for federal corruption created by a loophole that allows national parties to amass soft money. The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party. If these ambitions center on the courtship of large donors, there is always the danger that the parties' fundraising interests will color the judgment of those who lead or depend on them.

III. The Need for a Comprehensive Regulatory Scheme that Prevents Circumvention

The BCRA contains an integrated set of provisions designed to prevent national, state, and local parties from circumventing fundraising restrictions. Many of these [16 (DEV. 1-Tab 3)] provisions involve prohibitions on the transfer of funds. For example, national parties are prevented from accepting soft money transfers from state parties. State parties may not fund federal campaigns, directly or indirectly, using soft money. National parties may not accept soft money donations even for purposes of supporting state party activity that has no direct bearing on federal offices. Local, state, and national parties are prevented from contributing hard or soft money to certain tax-exempt organizations. In this section, I discuss the rationale for these restrictions.

Before taking up the issue of corruption in the next section, let us imagine the practical consequences of relaxing any or all of these restrictions. If state parties could transfer soft money to the national parties, donors would simply be instructed to direct their soft money donations to state parties that are not subject to state contribution limits, which would serve as financial intermediaries for the national parties. A

similar argument could be made about direct spending by state parties on federal campaigns, which is in some ways analogous to a transfer of funds. If state parties were allowed to spend soft money on federal campaign activity, states like Virginia or Illinois, which impose few restrictions on campaign contributions, would see their state parties become the political equivalent of offshore banks, funneling large sums of money to races around the country as though they were national parties.

The prohibition against national parties transferring soft money to state parties stems from concerns about the corrupting influence of unlimited donations, which I discuss below. Suffice it to say that lifting this prohibition returns us to the path that leads to an ever-widening soft money loophole. To create a system in which the national parties are banned from raising soft money, except for soft money raised on behalf of their state party allies, inevitably puts pressure on party operatives to construe national party expenditures as transfers to the states. Under the pre-BCRA provisions, the parties demonstrated great ingenuity in moving money around so as to minimize the amount of hard money needed to fund federal election activity. If the BCRA provisions regarding state and local parties were overturned, clever accountants will doubtless figure out ways to place a maximal share of the national parties' overhead and fundraising costs on the [17 (DEV. 1-Tab 3)] state parties' budget ledgers. This incentive system also puts pressure on the state parties to engage in as much federal election activity as possible so that the national parties can recoup their soft money investment. It would be no small irony if the BCRA provisions governing national-state party transfers were struck down on the grounds that Congress interfered unduly with state activity, because the resulting regulatory system would feature a dramatic increase in the role of state parties in federal

elections. For this reason, when reflecting on issues of federalism it is critically important that one consider not only the current role of state parties in federal election activity but also the probable future role should the regulatory system change in ways not intended by Congress.

The provisions governing state and national party transfers to tax-exempt organizations have a somewhat different character and rationale. The BCRA forbids the state and national parties from making donations—even hard money contributions—to certain tax-exempt organizations. At first, this provision may seem unnecessary, since presumably hard money has been collected in ways that reduce concerns about corruption. Why not let the parties make donations using hard money to tax exempt organizations involved in electoral activity?

When addressing this question, one must bear in mind that parties seek to win elections in order to gain power.[19] From an economic standpoint, it makes no sense for parties to transfer funds in order to assist political campaigns, since they could more efficiently (and with greater control over the end-product) spend directly on political activity. The parties' motive for transferring funds to tax-exempt organizations that are engaged in electoral activity is to gain control of these organizations, because doing so gives parties control over the

[19] A similar argument explains why the BCRA's provisions concerning "public communications" by parties, as distinct from communications by independent organizations, are not limited to those communications occurring during the 60 days preceding a federal election. Unlike interest groups, which pursue an issue-based agenda that transcends the election of candidates, parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences.

soft money that tax-exempt organizations are free to raise.[20] [18 (DEV. 1-Tab 3)] For example, the Republican National Committee is alleged to have controlled the tax-exempt National Policy Forum and other pro-Republican organizations.[21] Correctly surmising that the national parties could easily circumvent the new regulatory regime by creating satellite party organizations in the guise of tax-exempt organizations, which would be free to collect donations of unlimited size, the authors of the BCRA closed this loophole. Parties are prevented both from making these transfers and from setting up placeholder party organizations. These restrictions do not impinge upon the parties' ability to foster interest groups or build political coalitions. Should parties wish to transfer money to political action committees (which themselves must raise only hard money), they remain free to do so under the BCRA.

The ban on hard money transfers to so-called Levin accounts stems from the same concerns that led to a ban on transfers to tax-exempt organizations. If parties could contribute hard money to Levin accounts, they could gain influence over how the account is spent, including the money raised by the less restrictive Levin provisions. The underlying theory behind these BCRA provisions boils down to a simple and persuasive proposition: one should not allow

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[20] In the regulatory environment that preceded the BCRA, the parties seldom received large donations from tax-exempt organizations. National parties had no need to acquire soft money through this indirect route; they could simply raise soft money themselves. National parties, on the other hand, frequently transferred large sums of money to tax-exempt organizations because, unlike state parties, these tax-exempt organizations are not bound by allocation formulas that specify how much hard money must be spent in conjunction with soft money expenditures.

[21] Washington Post, 2/10/98. RNC's Schemes 'Evade Federal Election Laws.' p. A6.

the parties to skirt the soft money ban by using hard money to take control of soft money accounts.

The fungibility of campaign expenditures explains why donations to state parties solicited by state party officials for the purpose of conducting voter mobilization drives is a source of federal concern. In what way might they pose a threat of corruption to federal officeholders? Voter mobilization activities are an integral part of electoral campaigns; national parties spend millions on voter mobilization. National parties would be quite grateful to any other entity that engaged in this activity on their behalf, freeing up the national parties to spend their money on other things. From an accounting standpoint, this arrangement would be tantamount to a massive transfer of funds to the national parties. If a donor were intent upon currying favor with federal officeholders and the national parties they inhabit, there would be no better opportunity than making lavish [19 (DEV. 1-Tab 3)] donations to this type of generic campaign activity, were such donations outside the purview of the BCRA. The many informal connections between state and federal politicians and between national and subnational parties make this type of exchange easy to orchestrate.

Just as parties cannot co-opt tax-exempt organizations, they are not allowed under the BCRA to form ersatz party organizations in the guise of "leadership PACs." The BCRA prohibits state and national parties or their leaders from forming associations that raise soft money. Leadership associations not only represent a potential loophole; they constitute precisely the type of fundraising entity that amplifies the power of those public officials who are best positioned to raise large sums of money and act upon the donors' wishes. As I indicate in the next section, concerns about corruption become especially acute when large donors

form close and enduring relationships with officeholders who occupy leadership positions within government.

IV. Corruption

Powerful though parties may be, some of my colleagues in political science have often argued that they should be made more powerful still. A certain nostalgia for the ideologically cohesive parties of Europe or the urban party machines that once integrated European immigrants into American society encouraged some political scientists to endorse the soft money exemptions when they were first proposed in the late 1970s as a means of party-building. Parties continue to be viewed by many political observers as aggregators of preferences, coalitions that unify and give voice to pluralistic interests, hallmarks of free and competitive democratic polities. However, recognition of the many important functions of political parties should not overshadow the problems that arise when parties become conduits for large sums of money raised for and flowing to political campaigns. The fact that parties play a valuable role in representative democracy should not dissuade legislators from creating bulwarks against corruption.

[20 (DEV. 1-Tab 3)] What is corruption, and why does it deserve special weight in any policy discussion? Political scientists have long taken an interest in and an expansive view of corruption. In a seminal 1909 article entitled "The Nature of Political Corruption," political scientist Robert C. Brooks set the stage for later scholarship when he defined corruption as "[t]he intentional misperformance or neglect of a recognized duty . . . with the motive of gaining some advantage more or less directly personal" (p. 4).[22] Brooks'

[22] Brooks explains (pp.7-8) that "duty must exist or there is no possibility of being corruptly unfaithful to it . . . [S]ince an absolute despot is bound to no tangible duty, he cannot be corrupt in any way . . . Conversely, corruption necessarily finds its richest fields in highly organized communities which have entrusted their performance to the largest number of officials and citizens."

definition clearly encompasses what is ordinarily termed quid pro quo corruption, of which vote-buying is a prime example. But Brooks cautioned those who are "too prone to think of all political corruption as consisting essentially of such gross cases and sordid transactions" to consider less clear-cut examples that meet the criteria of neglected duty motivated by selfish interests. This broad conception of corruption continues to dominate contemporary scholarship.[23]

Although Brooks had little to say about the campaign finance issues of his day, his analysis provides a useful framework for thinking about the forms of corruption that a system of large donations to candidates engenders. What I would term *favor-currying corruption* occurs when officeholders attempt to garner future donations by pandering to the putative wishes of large contributors. Unlike quid pro quo corruption, the latter forms involve no implicit contractual arrangement between those involved but do redound to the personal benefit of the candidate seeking to win election. The political consequences, moreover, are not dissimilar: excessive compliance with the wishes of large contributors.

Even more subtle is *obligation-driven corruption*, which occurs when officeholders alter their behavior because they sense a debt to their financial backers. A sense of obligation may grow out of the personal relationship that officeholders may have forged with donors; indeed, candidates quite often turn to their friends for campaign contributions. Delivering

[23] See, for example, Thompson, Dennis. 1995. *Ethics in Congress: From Individual to Institutional Corruption.* Washington, DC: Brookings.

an outcome desired by the donor may be a way for the [21 (DEV. 1-Tab 3)] officeholder to maintain a good personal relationship with the donor and the donor's circle of friends. It may also bolster a legislator's reputation as someone who wields influence, which in turn attracts financial resources. Again, the net effect is that the officeholder motivated by private concerns pays undue attention to the aims of financial backers.

Like the motivations that underlie corruption, the manifestations of corruption may vary widely. A great deal of scholarly attention, as I note below, has been devoted to the ways in which campaign contributions influence legislative roll-call votes. Voting, however, is just one way in which legislators may express support for a donor's agenda. More subtle but no less important is the effort that a public official expends as a bill wends its way through the legislative process. One may readily imagine two legislators with identical voting records. One does nothing to assist the bill's passage. The other takes an active role shepherding the bill through the drafting and markup processes, buttonholing fellow legislators in an effort to drum up support in subcommittee and committee, acquiring a spot on the floor agenda, obtaining a favorable rule concerning amendments, and so forth. Although harder to quantify, legislative effort may ultimately be more consequential than roll-call votes.

In addition to encouraging legislative votes and behind-the-scenes effort, large campaign contributions may be rewarded by special access to elected officials. Mr. Buttenwieser's testimony provides an instructive glimpse of the access enjoyed by those who contribute large sums of money to national and state political parties. Mr. Buttenwieser readily acknowledges that his personal relationship with numerous U.S. senators and party leaders stems principally from his generosity as a campaign donor. By his account, the

link between donations and access is manifest in the practice of seating the largest donor next to the president at a political function. He also notes that the intimate fundraising affairs he attended frequently resolved into small group discussions between donors and elected officials, where lobbying and politicking occurred. There can be no doubt that donors enjoy special access to elected officials.

[22 (DEV. 1-Tab 3)] Even if federal officials were altogether immune to favor-currying motives and felt no sense of obligation whatsoever to these financial backers, they would nonetheless be exposed to the policy prescriptions that donors have special opportunities to present. These prescriptions may grow out of purely principled arguments or crass financial interests; the point is simply that this pattern of special access has corrosive implications for democratic governance. Continually upstaged by well-positioned insiders, the electorate may come to regard its political participation as meaningless.

The Supreme Court's conception of corruption seems in many ways to parallel that found in political science. The Court has made clear that its concerns about corruption extend well beyond patently illegal quid pro quo behavior. In *Shrink Missouri* (p. 201), the Supreme Court noted that "In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." In *FEC v. Colorado Republican Federal Campaign Committee* (2001), the Supreme Court indicated its concern about the "obligation" that large financial contributions threatened to create.[24]

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[24] The Court's comments in this case are directed specifically at the role played by parties as transmitters of donations: "Parties thus perform

Recognizing that our democratic institutions rely on voters' trust and participation, the Court points out that Congress has a legitimate right to pass legislation designed to address the public's perception that money is corrupting federal legislators. In *Buckley* (p. 34), the Court argued: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from the public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."

A pair of interesting empirical questions arise from this conception of corruption. To what extent do campaign contributions influence legislative voting, legislative effort, [23 (DEV. 1-Tab 3)] and access to elected officials? To what extent did the campaign finance system that the BCRA replaced appear corrupt?[25]

In order to ascertain whether campaign contributions affect roll call voting, legislative effort behind the scenes, or access to public officials, political scientists have used a variety of different research approaches. First, they have conducted extended interviews with those who make political contributions. Herndon's (1982) interviews with business and labor PACs suggest that their contributions to members of

functions more complex than simply electing candidates; whether they like it or not, they act as agents on behalf of those who seek to produce obligated officeholders" (p. 154).

[25] One may also ask whether the appearance of corruption in fact undermines the legitimacy accorded to democratic institutions by the electorate. Among the few studies to address this question empirically is the cross-national investigation by Seligson (2002), who finds that countries with higher levels of corruption (as rated by specialists familiar with the inner workings of these countries) also have electorates that accord less legitimacy to the country's political institutions. Seligson, Mitchell A. 2002. The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries. *Journal of Politics*. 64:408-33.

Congress are motivated by a desire to gain access to legislators.[26] Second, political scientists conduct quantitative studies of how members of Congress allocate their time during a typical workweek. Langbein (1986) quantifies the link between money and access, finding a statistical relationship between PAC contributions and the ways that members of Congress allocate time during their weekly schedules.[27] Third, they conduct somewhat more qualitative studies of the effort that legislators expended on behalf of legislation before a committee. Hall and Wayman's (1990) study of the way that House members shepherd legislation through committees suggests that money may buy not only access, but legislative effort.[28] Although contributions were not related to floor voting on dairy price supports, job training, and energy deregulation, Hall and Wayman find that contributions predict the amount of effort that supporters exerted on these issues during the committee markup process. By far the most common approach involves a statistical analysis of the correlation between roll-call votes and campaign contributions. Here, as Hall and Wayman point out in their review of roll-call voting research, the evidence is quite mixed. On tobacco issues, for example, some analysts find strong statistical [24 (DEV. 1-Tab 3)] relationships between tobacco industry contributions and votes on tobacco regula-

[26] Herndon, James F. 1982. Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns. *Journal of Politics*. 44:996-1019.

[27] Langbein, Laura I. 1986. Money and Access: Some Empirical Evidence. *Journal of Politics* 48:1052-62. Note that the size of the PAC contributions at issue in Langbein's research pale in comparison with the immense soft money contributions that were seen toward the end of the 1990s.

[28] Hall, Richard L., and Frank W. Wayman. 1990. Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees. *American Political Science Review* 84:797-820.

tion (Monardi and Glantz 1998), but on the whole it appears that the typical roll-call vote is weakly predicted by members' financial backing.[29]

The aforementioned studies are suggestive, but they suffer from a basic methodological limitation. Correlations between contributions and legislative behavior cannot disentangle whether contributions reward fealty, create it, or merely reflect ideological affinity between legislators and their financial backers. For that matter, one may imagine scenarios in which contributors show special generosity to their political adversaries in an effort to blunt their opposition. In response to this basic methodological critique, recent research on campaign finance has taken a more dynamic approach, examining how legislators and contributors behave over time. Here, the ideological proclivities of legislators are held constant, and what varies is their capacity to deliver favors to contributors.

One study of this kind is Gordon's (2001) analysis of a series of votes on California's Senate Governmental Organization Committee.[30] Gordon finds that contributions have a stronger effect on those votes that are crucial to the legislative outcome. The implication of this study is that while contributions may influence only a small proportion of legislative balloting, contributions may nonetheless have a significant impact on legislative outcomes. Another dynamic approach is to examine the manner in which interest groups allocate their campaign contributions as the power wielded

[29] Monardi, Fred, and Stanton A. Glantz. 1998. Are Tobacco Industry Campaign Contributions Influencing State Legislative Behavior? *American Journal of Public Health* 88:918-23. See also the literature review in Sorauf, Frank J. 1992. *Inside Campaign Finance: Myths and Realities*. New Haven: Yale University Press, pp. 163-174.

[30] Gordon, Stacy B. 2001. All Votes Are Not Created Equal: Campaign Contributions and Critical Votes. *Journal of Politics* 63:249-69.

by legislators changes. Cox and Magar (1999) address the question "How much is majority status in the U.S. Congress worth?" by examining the flow of campaign dollars before and after a switch in party control of the House and Senate.[31] Cox and Magar find strong statistical evidence that donors favor the party in power, a clear indication that they see [25 (DEV. 1-Tab 3)] their donations as a means to gain access and influence, as opposed to a mere expression of ideological affinity. This work builds on the previous work of Romer and Snyder (1994), who examine how PAC contributions to members and chairs of congressional committees change as these elected officials switch committees or leadership assignments.[32] Romer and Snyder find powerful evidence that representatives who join the Banking Committee, for example, enjoy a substantial influx of new contributions from Banking PACs; the Ways and Means committee seems to be especially attractive to Corporate and Trade PACs; and committee leadership positions are always rewarded with an extra dollop of cash.[33] Whether contributors seek access or

[31] Cox, Gary W., and Eric Magar. 1999. How Much is Majority Status in the U.S. Congress Worth? American Political Science Review 93:299-309.

[32] Romer, Thomas, and James M. Snyder, Jr. 1994. An Empirical Investigation of the Dynamics of PAC Contributions. *American Journal of Political Science* 38:745-69.

[33] This analysis is confirmed by Dow et al.'s (1998) study of campaign contributions by economic interest groups to members of the California Assembly. Dow et al.'s statistical analysis shows quite clearly that industries (e.g., agriculture, labor, finance) target their contributions to members who sit on the committees with jurisdiction over them. Unlike the Romer and Snyder essay, however, Dow does not examine the manner in which contributions change as members change committee assignments. Dow, James K., James W. Endersby, Charles E. Menifield. 1998. The Industrial Structure of the California State Assembly: Committee Assignments, Economic Interests, and Campaign Contributions. *Public Choice* 94:67-83.

influence remains unclear from the dynamic relationship between legislative power and donations; there can be no doubt, however, that contributors target their donations to officeholders who are best positioned to reciprocate with valuable favors or to retaliate against them in the event that they do not contribute.

One particularly lurid example of the strategic way in which interest groups target their donations occurs when large donations are made to both parties simultaneously. In such cases, donors seem to throw ideological affinity to the wind, ensuring instead that whichever party wins remains in their debt. For purposes of illustrating this point, let us put aside instances where corporate or union donors give token amounts of money to one party while showering the other with cash (e.g., Union Pacific gave $676,858 to GOP committees in 1995-6, while giving Democratic committees just $5550). Let us also ignore donations made by corporate executives and focus solely on donations made by corporate entities and unions. According to the FEC, the list of lavish donations to both parties is lengthy. One notable example from the 1999-2000 election cycle is Enron's contribution of $607,065 to Democratic Party committees and $688,210 to Republican [26 (DEV. 1-Tab 3)] Party committees, but this pattern is by no means restricted to such celebrated cases. The tactic of two-party donations has become commonplace. During the 1999-2000 reporting cycle, AT&T donated $1,432,469 to the Democrats and $2,197,261 to the Republicans. MGM Mirage, Inc. gave $658,086 to the Democrats and $861,997 to the Republicans. Public spirited though these and many other corporations may be, it strains credulity to think that their evenhanded distribution of shareholders' money to both parties grows out of their desire to foster democratic discourse.

Ironically, the most strident charges of corruption of federal officeholders by party fundraising come from the parties themselves. In the wake of the Enron collapse at the beginning of 2002, Democrats charged the Bush administration with letting its energy policies be shaped by Enron executives, who were prominent Republican donors. The National Republican Senatorial Committee fired back with a memo entitled "Enron Corporation And Arthur Andersen: The Democratic Connection," which pointed out that the two companies and their employees donated $4.55 million to the Democratic Party and "affiliated committees," including 48 of 50 Democratic senators. The current scandal is reminiscent of the partisan crossfire that occurred in the wake of Democratic fundraising scandals, only here the Republican Party finds itself on the defensive and mounts a counter-attack: "As Democratic officials fraudulently and maliciously attack the Bush administration for being 'an Enron government,' they ignore the deep, long relationship between Enron, [its accounting firm] Arthur Andersen and the Democratic Party." Among the traits common to the Republican and Democratic Parties is their shared belief that the opposition is beholden to special interest contributors.[34]

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[34] These charges are readily found in press releases issued by both parties. In an RNC press release issued on April 29, 2000, Jim Nicholson, then chairman of the RNC, charged that "there are just two reasons Clinton and Gore won't let reasonable legislation become law—first, because they'd rather have the political issue, and second, because they're dependent for campaign contributions on the trial lawyers, and are doing their bidding." In a DNC press release issued in March 28, 2002, Terry McAuliffe stated that "the Energy Secretary rubber-stamps rules and regulations drafted by a Republican energy donor [and that] every day there are more and more disturbing disclosures about the cozy relationship between the administration and Enron and the never-ending favors it dispensed for big donors."

One reason that the parties advance these charges is that they recognize that the public is receptive to the thesis that unlimited donations encourage corruption. It is not [27 (DEV. 1-Tab 3)] difficult to demonstrate empirically that the American public takes a very dim view of unlimited contributions, whether to candidates or political parties. Consider the overall impression that the public has developed about the undue influence of large campaign donations. A CBS News Poll of 1,030 adults conducted during January 15-17 of 2002 asked: "In general, do you think many public officials make or change policy decisions as a direct result of money they receive from major campaign contributors?" Respondents overwhelmingly said "yes" (72%). More said that they "don't know" (15%) than said "no" (13%).

This question talks about public officials and major campaign contributors.[35] What about political parties? The public, when presented with a balanced question that invites it to consider the risks of campaign finance reform, nevertheless endorses the basic principle of limiting contributions to

[35] A poll of 903 adults conducted by TNS Intersearch during March 22-25, 2001 asked the following:

"Do you think politicians do special favors for people and groups who give them campaign contributions, or not?"

Yes: 93%

No: 6%

Don't know 1%

A more detailed breakdown of responses my be created based on the follow up question asked of those who responded "Yes": "Do you think that happens often or only sometimes?"

Yes, Often 80%

Yes, Sometimes 13%

No, Does Not Happen 6%

Don't know/No Opinion 1%.

political parties. A Reuters/ Zogby poll of 1,000 likely voters surveyed March 27-28, 2001 asked: "Which statement do you agree with more: Unlimited contributions to political parties should be banned as part of campaign finance reform or banning so-called soft money would hamper the political process, weaken the two parties and limit free speech?" Fully 66% of respondents said that unlimited contributions should be banned, as compared to 26% who said they should not, with 9% unsure.[36]

[28 (DEV. 1-Tab 3)] Is it reasonable for the public to worry that soft money donations to parties will lead to corruption? Sometimes those who study politics take the view that political parties, by aggregating the preferences of many interest groups, dilute the corrupting influence of particular special interests. By this account, money given directly to candidates might corrupt, but money given through parties is cleansed of its corrupting influence.

The problem with this argument is that it loses sight of the conditions that give rise to corruption. Scholars who study corruption have emphasized three such conditions: (1) large payoffs to those involved, (2) small probabilities of detection and punishment, and (3) enduring relationships between donors and politicians so that informal deals can be moni-

[36] There is also evidence of considerable public support for the policy of limiting business and labor contributions to political parties. A Gallup Poll conducted October 6-9, 2001 asked 920 registered voters: "As you know, 'soft money' is the amount of money that individuals, businesses, and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the amount of 'soft money' that any individual or group can contribute to the national political parties?" Fully 72% said favor, 24% oppose, and the remainder expressed no opinion. Quite similar results were reported by an ABC News Poll of 1,020 adults conducted during October 13-19, 1999 and an ABC News/Washington Post Poll of 1,006 adults conducted December 12-15, 1999.

tored and enforced.[37] Unlimited soft money donations satisfy all of these conditions.

First, soft money is a highly valuable resource for both donors and candidates. The reality of soft money donations is that donors are often instructed to direct their funds to political parties, which use them in ways that benefit specific candidates (e.g., when the party runs "issue ads" attacking a candidate's opponent). As for detection and punishment, probabilities appear low given the small proportion of contributions that received appreciable negative publicity or regulatory sanction. Finally and most importantly is the ongoing relationship between donors and public officials. When donors make soft money donations to parties on behalf of candidates, neither the donors nor the parties have any incentive to hide this fact from the candidates, which is why the BCRA prohibits federal officials from raising soft money on behalf of state parties. Parties serve as matchmakers for donors and candidates, finding extra cash for candidates [29 (DEV. 1-Tab 3)] whose donors might otherwise confront hard money limits and gladly holding the money so that the transaction can be made. Parties, like banks, have an incentive to encourage these arrangements year after year, particularly as it gives them access to donors who might otherwise bypass parties and contribute directly to candidates. As parties become increasingly dependent on financial support in order to finance their growing overhead expenses and as their base of party activists diminishes (the subjects of the next section), parties' desire and capacity to resist perennial

[37] Glaser, Daniel (ed.). 1974. *Handbook of Criminology*. Chicago: Rand McNally, p. 1062. On the shadow cast by the prospect of future interaction, see Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.

large donors' influence diminish.[38] Indeed, the economic efficiencies of raising money from smaller numbers of large donors create constant pressure on parties to narrow rather than broaden their financial bases.

V. Evolution of Political Parties and Electoral Competition

A century ago, when political scientists studied powerful and sometimes notorious urban party machines, they would raise the question: What features of contemporary parties and the electoral environment they inhabit make them prone to corruption? This question has again become timely, for parties now handle quantities of money that even in inflation-adjusted terms would have been unimaginable a century ago. Regardless of whether one considers actual or perceived impropriety, certain features of parties and the environment they inhabit make the threat of corruption more than a hypothetical possibility.

In order to place the concern about corruption in proper perspective, one must understand that parties are highly adaptable organizations. Pitted in closely contested, high

[38] It should be noted that the Supreme Court, too, has rejected the blithe argument that parties are immune to corrupting influences:

> When we look directly at a party's function in getting and spending money, it would ignore reality to think that the party's role is adequately described by speaking generally of electing particular candidates. The money that parties spend comes from contributors with their own personal interests . . . In fact, many PACs naturally express their narrow interests by contributing to both political parties during the same electoral cycle . . . Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors. (*FEC v. Colorado Republican*, p.153)

stakes competition with one another, the two major parties constantly explore new [30 (DEV. 1-Tab 3)] technologies, fundraising strategies, and legal maneuvers. It is no accident that soft money loopholes were explored in the late 1980s, widened in the 1990s, and exploited to the hilt in the 2000 election. The parties are constantly on the prowl for opportunities to gain momentary advantage over their rivals. They are quick to imitate their opponents when it appears that they are on to something new.

Adaptation is not simply a matter of exploiting regulatory loopholes. Innovation occurs at a rapid pace in every venue of political competition. While soft money has won the limelight in recent years, one should not lose sight of the fact that hard money fundraising has continued to rise over time, despite explosive growth in soft money fundraising. Parties complain about provisions in the BCRA that make it more difficult for them to raise large sums of money, but the fact is that parties have always managed to find a way to raise larger and larger sums of money under hard money constraints. Table 1 shows the trend in hard and soft money donations to the political parties since the 1991-1992 election cycle, when the FEC first began tracking these figures. Soft money donations rose from $86.1 million to $495.1 million between 1991-2 and 1999-2000, but hard money contributions rose markedly as well, from $445 million to $741 million. One should never underestimate a party's capacity to adapt and change, particularly in response to the behavior of the rival party.

Table 1: National Party Receipts 1992-2000

	1991-92	1993-94	1995-96	1997-98	1999-2000
Hard Money	$445.0	$384.7	$638.1	$445.0	$741.0
Soft Money	$86.1	$101.6	$262.1	$224.4	$495.1
Total	$531.1	$486.3	$900.2	$669.4	$1,236.1

Source: "FEC Reports Increase in Party Fundraising for 2000" release of May 15, 2001

With the advent of computerized data bases, commercial marketing firms, and private campaign consultancy, parties have grown increasingly capital-intensive. Many [31 (DEV. 1-Tab 3)] of the tasks formerly performed by party activists —phone banking, envelope-stuffing—are now subcontracted to private firms. Party activists have been supplanted to a large extent by campaign professionals who conduct polls, devise media campaigns, and the like. Party professionals have little incentive to court political activists, who can be unruly and willful, when pliant subcontractors follow orders for a fee. As a result of these changes, the proportion of the American public that reports working for a political party has declined steadily since the early 1970s. Robert Putnam reports that between 1973 and 1994, the proportion of Americans working for a political party fell by over 50%.[39]

As parties became less reliant on local activists and more reliant on a growing class of campaign professionals and subcontracted services, they also became more reliant on fundraising. Fundraising, too, became more professionalized and sophisticated. Unlike other party activities, fundraising is accorded special importance by party professionals, who recognize that their own financial livelihood depends on abundant donations.

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[39] Putnam, Robert D. 2000. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, pp. 41, 448-9.

In contrast to the general public, those who derive economic benefits from a system of free-flowing donations display little enthusiasm for proposals designed to limit campaign contributions to political parties. In 1997-1998, Princeton Survey Research Associates conducted a survey of 200 principals and partners in consulting, media, polling, and fundraising firms involved in House or Senate campaigns— a group of people that includes many past party professionals and that has strong personal ties to such people. A series of questions began: "As I read you some changes that have been proposed to reform the way that political campaigns are financed, please tell me how you would rate each in terms of benefit to the country. . . . Ending soft money." Only 16% rated the idea "excellent," 17% "good," 34% "only fair," and 33% rated it "poor." By contrast, campaign professionals were much more enthusiastic about "increasing individual contribution limits": 38% called the idea "excellent," 27% "good," 14% "only [32 (DEV. 1-Tab 3)] fair," and 20% "poor." Despite the fact that many campaign professionals are ideologically sympathetic to groups that seek to limit the role of money in politics, those who make a living from campaign donations take a dim view of measures that would make fundraising less efficient.

Parties' and campaigns' enormous appetite for money augments concerns about corruption. In an era of capital-intensive campaigns, parties and officeholders are constantly pursuing large financial donors. This pressure creates strong incentives for the individuals who work with or within political parties to become increasingly entrepreneurial in the ways that they solicit cash from donors. Proving one's mettle as a successful party fundraiser is a way to march to the forefront of the party. Terry McAuliffe's meteoric rise to power within the DNC attests to the prominence one may attain as an artful and assiduous fundraiser.

Sometimes parties are less subtle and simply appoint their campaign contributors to leadership roles. For example, it may be recalled that in January of 1997, President Clinton appointed Steve Grossman, a Massachusetts businessman who ranked among the 50 largest donors to the DNC, as DNC co-chair. Lest one forget the overlap between state and national parties, it should be noted that Mr. Grossman had formerly served as Chairman of the Massachusetts State Democratic Party.

That big donors should wind up sleeping in the Lincoln Bedroom of the White House is one logical implication of an incentive system that revolves around soft money donations of unlimited size. Indeed, one virtue of a regulatory system that specifies a maximum amount that individuals may contribute to political parties is that fundraising activity no longer takes on the appearance of an unseemly auction designed to extract a maximal amount of cash from potential donors. The BCRA specifies the largest bid that an individual may make for the affections of a political party and the public officials who inhabit it. These new limits permit what the typical voter would consider a very generous contribution to the political parties while reducing the risk of undue influence by large donors by encouraging parties to broaden their base of contributors.

[33 (DEV. 1-Tab 3)] **VI. Money and Party-Building**

What will become of parties in the wake of the BCRA? Some campaign professionals who inhabit parties and who are dependent on their fundraising success would have us believe that parties cannot survive without access to unlimited donations. Their protests are hardly surprising, since campaign professionals have an interest in contending that campaigns cannot be waged on a large scale without large sums of money. Their livelihood revolves around the sale of

services to parties and campaigns, services such as the preparation of media advertisements, the design and distribution of direct mail, the execution and analysis of opinion polls, and so forth. Naturally, campaign professionals are quick to paint a grim portrait of what campaigns and democracy would be without their ads, polls, and four-color mailers.

The history of federal hard money contributions, however, suggests that the parties have been quite capable of finding new ways to raise ever-larger quantities of hard money even under the old contribution limits. This point has already been made with respect to the national parties, whose hard money receipts have increased by hundreds of millions of dollars in the space of one decade.

At the state level, the history of fundraising belies the notion that contribution limits seriously impair parties' ability to raise money. Measuring state party fundraising is complicated by the fact that standardized reports are available from the FEC regarding only expenditures of allocable soft money. (Recall that under the pre-BCRA system, the parties could spend soft money for certain joint state/federal election activities, so long as a portion of these expenditures were also paid for with hard money.) Nevertheless, the trend is quite clear. Soft money expenditures have risen markedly over time, even when one focuses attention on federal midterm elections in which the vagaries of presidential campaign strategy are absent. According to the FEC, the state parties spent $80.2 million in allocable soft money in 1993-1994; four years later, this figure had risen to $153.2 million. This increase was not confined to states like Illinois or Virginia, which place no [34 (DEV. 1-Tab 3)] limits on contributions to political parties, even from corporations or labor unions. Consider, for example, Connecticut, which prohibits labor and corporate contributions as well as national party transfers and places a $5,000 individual contribution limit on

donations to state parties. In 1993-1994, the parties spent $1,020,102 in money in accordance with state limits: despite some of the most stringent campaign finance laws in the country, this figure had doubled to $2,086,438 by 1997-1998. Parties are skilled at raising money and adapt their tactics to the regulatory regime within which they operate.

The recent testimony of Ryan M. Erwin, chief operating officer of the California Republican Party, provides a rare opportunity to examine closely the development of state level fundraising over time and the capacity of a political party to broaden its financial base when it chooses to do so. According to Chart 4 (p. 1278) under tab 19, the number of California Republican Party donors giving the maximum allowable hard money contribution of $5000 rose dramatically between the 1997-98 and 1999-2000 election cycles. Whereas the amount raised in $5000 amounts was $290,000 in 1995-1996 and $140,000 in 1997-1998, by 1999-2000 this figure had skyrocketed to $3,030,000. This surge in maximum federal contributions was due, according to Mr. Erwin, to the increased effort that the party expended in garnering this type of donation (p. 146). Broadening the hard money base of a party in this fashion is feasible, according to Mr. Erwin, so long as parties endeavor to "work even harder" to do so.

Viewed from the broader standpoint of whether limits on contributions restrict free expression or the vigorous communication of ideas, there is no evidence whatsoever that these state-level contribution limits have historically prevented state parties from engaging in what the Court has termed "effective advocacy." It is important to remember that in other Western-style democracies and in our own recent past, one finds vigorous political dialogue and high

levels of electoral participation despite relatively small per capita campaign expenditures.[40]

[35 (DEV. 1-Tab 3)] If recent trends in campaign spending should be halted or even reversed by the BCRA, it is unlikely that either democracy or the parties themselves will suffer the dire consequences that Plaintiffs allege. The irony of the two parties' challenge to the Bipartisan Campaign Reform Act is that the parties—as distinct from the campaign professionals who inhabit them—might actually be better served by making campaign funds more difficult to raise. The shift away from labor-intensive campaigning has caused local party activism to die out, with a resultant drop in face-to-face mobilization activity. I have argued elsewhere that this decline in personal contact between campaigns and voters, as distinct from impersonal contacts by way of mass media, mail, or commercial phone banks—accounts for the long-term decline in voter turnout that the U.S. has experienced since the 1960s.[41] In the long run, the BCRA may well strengthen parties. First, by raising the marginal cost of fundraising, it provides incentives for parties to invest in local infrastructure rather than in the here-today-gone-tomorrow media campaigns that transfer large sums of money to commercial marketing firms but do little to inspire the ongoing loyalty and participation of the electorate. Second, by limiting the size of donations, it forces the parties

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[40] See, for example, the figures presented for the United Kingdom in Butler, David. 1995. *British General Elections since 1945*, 2nd ed. Oxford: Basil Blackwell. Despite longstanding campaign spending limits at the constituency level and relatively limited national party spending prior to 1979, Britain's democratic institutions and level of electoral participation were quite vigorous.

[41] Gerber, Alan S., and Donald P. Green. 2000. The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment. *American Political Science Review* 94:653-63.

to broaden their base of financial backers. Third, by eliminating the soft money donations that enable large donors to gain special access to officeholders, it reduces the mounting tension between parties and democratic accountability.

[36 (DEV. 1-Tab 3)] I declare under penalty of perjury that the foregoing is true and correct.

Signed DONALD GREEN Executed on 9/23/02

[37 (DEV. 1-Tab 3)] Exhibit A: Curriculum Vita

Exhibit B: List of Materials Considered in Preparing this Report

Exhibit C: Data from Professor Jeffrey B. Lewis

Exhibit D: Declaration of Peter L. Buttenwieser

Exhibit E: Spreadsheets on Hard and Soft Money Trends, Transfers of Nonfederal Funds for Allocable Expenses as Reported by State Committees, and Top Donors from 1995-2001.

The Impact of the BCRA on Political Parties: A Reply to La Raja, Lott, Keller, and Milkis

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October 7, 2002

Taken together, the reports of Professor La Raja, Professor Emeritus Keller, Professor Milkis, and Mr. Lott make the following arguments:

1. The Bipartisan Campaign Reform Act (BCRA) will lead to a decline in the amount of money available to parties.
    a. The decline in funds will adversely affect the "strength" of state parties.
    b. The decline in funds will adversely affect voter mobilization efforts, depressing turnout.
    c. The decline in funds will adversely affect the electoral prospects of challengers.
2. The BCRA, by banning soft money, will undermine the role of parties.
    a. The dearth of soft money will undermine the electoral accountability that party platforms provide and will expose the American political system to more influence from interest groups, which are prone to extremism.
    b. Strong parties are bulwarks against corruption. By weakening parties, the BCRA exacerbates the threat of corruption.

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[5]*Adaptation and Party Fundraising.* The adaptability of parties mentioned by Professor La Raja and charted in the historical narratives of Professors Milkis and Keller is central to understanding how the BCRA is likely to shape campaign finance in years ahead. The parties will not stand still once soft money becomes unavailable to the national party committees. To assume that the dollars that are currently donated as soft money will simply dry up fails to anticipate the actions that parties will take in order to recoup these funds. The recent attempts by the California Democratic and Republican Parties to demonstrate how the BCRA's provisions will result in a deadweight loss of revenues are premised on the assumption that neither party will do anything to gain a fundraising advantage over the other, which is absurd. The logic of interparty competition forces parties to innovate and adapt.

I therefore reject the flawed methodology of extrapolating from past contribution patterns as though no adaptation will occur. One can readily envision several compensating trends that will occur once the use of soft money for federal election activities is restricted. Under the provisions of the BCRA, which relaxes the hard money limits, state and national parties will be encouraged to broaden their financial base of hard money contributors. The dramatic increase in hard money fundraising over the past decade leaves little doubt that this can be achieved (see below). Indeed, the task of cultivating new party supporters will be made easier to the extent that the BCRA allays **[6]** public cynicism about corruption and party finance. Second, much of the soft money that formerly flowed through the national parties to the states in the form of nonfederal transfers will instead go to the states in the form of Levin contributions. As Professor La Raja points out (p.44), the parties now tap an abundance of small soft money contributors who, under the terms of the BCRA, will still be able to support the parties through Levin funds. And, of course, the BCRA does nothing to restrict soft money donations to state parties insofar as these funds

are used to pay for activities that do not affect federal elections.

Let us not forget that if this debate were occurring in 1992 rather than 2002, the Plaintiffs would bemoan the irretrievable loss of $86.1 million in soft money donations to the national political parties during 1991-1992. Yet this figure has since been dwarfed by the $296 million growth in hard money receipts between 1991-1992 and 1999-2000, as hard money receipts grew from $445 million to $741 million (during a period when parties were free to raise soft money).[1] I therefore reject the notion that the BCRA will impoverish political parties.

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[8] *Soft Money Funding and Party Strength.* Suppose for the sake of argument that state parties were to lose substantial funding as the result of the BCRA. Suppose that the upward trajectory in state party *hard money* fundraising were suddenly halted.[2] Would the lack of money undermine the "strength" or "capacity" of state parties, as Professor La Raja asserts? What evidence suggests that party strength and funding are related? Professor La Raja on page 22 presents data from the Frendreis and Gitelson (1997) survey, the methodology of which is not described, to suggest that 335 local Republican committees became more likely to distribute lawn signs between 1980 and 1996, purportedly due to an infusion of soft money. Curiously, however, the chart on page 23 shows that these organizations simultaneously became *less* likely to conduct voter registration drives and *less* likely to organize telephone campaigns. Taken as a whole,

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[1] Source: "FEC Reports Increase in Party Fundraising for 2000" release of May 15, 2001.

[2] According to the Biersack declaration (Table 11), hard money receipts by the state parties rose from $111.2 million in 1991-92 to $180.5 million in 1995-96 to $309.6 million in 2000.

these trends suggest that the infusion of soft money did not lead to a general increase in voter mobilization activity.

Even if one were to accept the notion that these local parties became more active, the causative role of soft money here is impossible to distinguish from a myriad of other factors, such as the revitalization of party competition in the South, the revival of **[9]** partisanship in the electorate, the ideological polarization of the parties after the Carter administration, and so forth.[3] Exactly the same criticism can be leveled at the 1980 vs. 2000 comparison of state parties that Professor La Raja presents on page 37. Professor La Raja later presents results from his own dissertation, in which he shows that an index of party strength (which includes such factors as "the size of party staff and off-season budgets," p.32) is correlated with the amount of money that the state parties receive. Professor La Raja correctly points out (p.33) that this relationship could be merely a spurious reflection of the fact that "strong party organizations tend to be better at raising money." Indeed, it could be a spurious reflection of many factors (e.g., the competitiveness of a state's elections), not least of which is the fact that off-season budgets are used to define and measure party strength. Inexplicably, however, Professor La Raja concludes that it is "clear" that preventing the national parties from raising soft money would weaken state parties. This conclusion is anything but clear from the numbers that Professor La Raja reports.

Nor is this conclusion sustained when one examines more closely the characteristics of state parties, after years of alleged party-building funded by soft-money. The Krasno and Sorauf case studies of Colorado and Missouri, cited in their expert report, dispel the blithe notion that soft money has created vital state parties. These authors point out that the RNC -- rather than the Colorado Republican Party -- was re-

[3] Green, Donald, Bradley Palmquist, and Eric Schickler. 2002. *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters*. New Haven: Yale University Press.

sponsible for hiring the executive director of the state party, who resided in **[10]** Washington, D.C. before assuming his new job. Despite an infusion of money from the National Republican Senatorial Committee, which provided most of the state party's funding, the party was not able to organize a volunteer phone bank or print out mailing labels for its own members (pp.31-32).[4] The Missouri Republican Party was largely a check-writing organization that paid outside vendors to run its phone banks and send its direct mail. Its total list of contributors numbered just 1000 individuals and entities, of whom just 36 provided 80% of its receipts, excluding national party transfers (p.32). This assessment of the vitality of state parties under a soft money regime is echoed by Senator Brock, former chair of the RNC, who reports in his declaration that his experiences as a candidate in Maryland convinced him that "the enormous growth of so-called 'soft money' in the past decade had allowed both parties to substitute those funds for the more arduous task of grass-roots organizing, thereby inflating costs and devaluing personal participation" (Brock declaration, paragraph 3).

This desultory picture is quite different from the one that Professor La Raja conjures in his extended description of campaign hoopla and grassroots mobilization. Soft money turned state parties into the equivalent of offshore banks, whose principal activity was to shuttle money back and forth to satisfy allocation formulas and to pay for expensive mass media campaigns orchestrated by the national parties. Notice that this top-down integration of what had formerly been **[11]** a decentralized arrangement of local, state, and national parties has caused them to drift markedly from the idealized notion of a decentralized political party described by Professor

[4] Lest it be argued that the capacities of state parties would deteriorate further were the national parties unable to provide state parties with technical assistance (p.62), training (p.17), daily messages (p.20), and websites (p.21), the BCRA allows for all of these collaborative activities so long as they are paid for with hard money.

Milkis (p.13). If decentralized party politics and local government are indeed the "bedrock of American democracy," soft money has contributed to its erosion.

Limiting soft money, far from weakening parties, will make them stronger. Parties will be encouraged to reach out to their supporters for volunteer labor and small donations. To do so, parties will be encouraged to inspire their activists with a policy agenda. The free flow of soft money has meant that parties have little need to inspire support; they can simply purchase all of the labor they require to execute a campaign. Professors La Raja, Milkis, and Keller pine for more ideologically robust and accountable parties but fail to recognize that the abundance of soft money reduces the role played by issues.[5]

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[5] The famous *Toward a More Responsible Two-Party System* report that these authors cite with reverence advocates not the mere strengthening or centralization of parties but instead the creation of parties that promote vigorous grassroots participation: "Party membership ought to become a year-round matter, both with constructive activities by members and with mechanisms by which party organizations can absorb the benefits of wider political participation." (1950, p.30) Soft money has proven inimical to this goal for the reasons articulated above by Senator Brock.

DECLARATION OF MORTON KELLER

I. Background and Qualifications

1. I was a professor of American history from 1956 until my retirement in 2001, specializing in American political, legal, and institutional history. I received my B.A. with Highest Honors from the University of Rochester in 1950, and M.A. and Ph.D. degrees from Harvard University in 1952 and 1956.

2. I taught at the University of North Carolina at Chapel Hill from 1956 to 1958, the University of Pennsylvania from 1958 to 1963, and at Brandeis University from 1964 until my retirement in 2001. I have been a visiting professor at Harvard (1963-64), Yale (1968), Sussex (England) (1968), and Oxford (1980-81), where I was Harmsworth Professor of American History.

3. I was awarded the American Historical Association's Littleton-Griswold Prize in Legal History (1995). I am an elected member of the Society of American Historians (1978-), the Massachusetts Historical Society (1979-), the American Academy of Arts and Sciences (1980-), and the British Academy (1999-).

[*2] 4. I have written or edited fifteen books, dealing with American political, legal, governmental, and institutional history. They include Affairs of State: Public Life in Late Nineteenth Century America (Harvard, 1977); Parties, Congress, and Public Policy (American Historical Association Bicentennial Essays on the Constitution, 1985); co-editor and contributor, The Encyclopedia of the United States Congress (4 vol's., Simon and Schuster, 1994), co-editor and contributor, Taking Stock: American Government in the Twentieth Century (1999).

5. I have published more than fifty articles, including "Reflections on Politics and Generations in America," Daedalus (1978); "Corruption in America," in A.S. Eisenstadt et al, Before Watergate (1978); "Anglo-American Politics, 1900-1930, in Anglo-American Perspective," Comparative Studies in Society and History (1980); "The Politics of State Constitutional Revision, 1820-1930," in K.L. Hall et al, ed's., The Constitutional Convention as an Amending Device (1981); "Powers and Rights: Two Centuries of American Constitutionalism," Journal of American History (1987); "The Cycles of Federalism," Governing (1988); "Political Parties and the Federal Government," in A Historical Guide to the U.S. Government (1998); and "The New Deal and Progressivism: A Fresh Look," in Sidney Milkis et al, ed's., The New Deal and the Triumph of Liberalism (2002).

6. My curriculum vitae, including a full list of my publications, is attached as Exhibit A hereto.

7. In preparing this declaration, I have relied upon my own writings and research concerning the history of political parties and American political history, and the writings and research of the leading historians of political parties and American political history, including the published sources cited herein. I am being compensated for my services in connection with this case at the rate of $250 per hour.

[*3] II. Political Parties, American Government, and Democracy

a. The Early Republic: 1789-1824

8. There is no reference to political parties in the Constitution; and the Founders were quick to condemn "parties." But "party," "faction," and "interest" were interchangeable words in the late eighteenth century. When he warned of parties or factions in his Federalist #10, James

Madison had in mind something far closer to modern interest or advocacy groups than to today's political parties. He thought that a major function of the Constitution was to constrain the ability of factions to control the new government, and to strike a balance between rule by faction and rule by tyranny. It quickly became evident that the most effective instrument to accomplish that goal was a two-party system.[1]

9. Because the Constitution requires regularly scheduled elections to Congress and the presidency, and it is necessary to put together state and national coalitions to secure power in a winner-take-all system, a two-party structure was made necessary. By 1794 there were two national parties, Federalist and Republican, each with:

- recognized leaders (Washington, Hamilton, and Adams among the Federalists, Jefferson, Madison, and Burr among the Republicans);

- party positions on major issues such as Hamilton's economic program and Republican opposition to the Jay Treaty;

- national newspapers (John Fenno's United States Gazette for the Federalists, Philip Freneau's National Gazette for the Republicans);

- close links between the national and state parties (through associations such as the Society of the Cincinnati and the Washington Benevolent Societies for the Federalists, and the Democratic-Republican Societies for the Jeffersonian Republicans).

[*4] - The election of 1800--barely a decade after the establishment of the new nation--saw the full emergence of a two-party system, in which the challenger could both win and peacefully assume control of the government.[2]

10. While the parties quickly dominated the American political system, they did so in a political culture still under the sway of the eighteenth-century assumption that government should be run by an elite of talent, education, and social standing. The Federalists and the Jeffersonian Republicans have been called **cadre** parties--that is, organized and defined from the top down. As elite and limited parties, they did relatively little to foster the growth of American democracy.[3]

- John Adams was George Washington's designated successor in the presidency; his son John Quincy would be the next (and last) President with a Federalist pedigree;

- The Republican leadership was concentrated in the so-called "Virginia dynasty," which dictated the sequence of the Jefferson, Madison, and Monroe presidencies from 1801 to 1825.

- Voting, not high during the Federalist-Jeffersonian Republican years, plummeted after the War of 1812, when the relatively party-less "Era of Good Feelings" prevailed. In the 1820 presidential election, Baltimore had 568 voters out of a population of 63,000; Richmond had 17 out of a population of 12,000. Turnouts of two to three percent of eligible voters were not uncommon in state and local elections in Virginia, Maryland, and Massachusetts.

[*5] b. Mass Parties and Political Democracy: 1828-1848

11. The process of party adaptation to a more democratic American society began in the 1820s, and was substantially completed in the 1830s. Between the 1828 election of Andrew Jackson and the Civil War, the Democratic and Whig parties dominated the American political scene, as the Federalists and the Jeffersonian Republicans had from the 1790s to the 1820s. But unlike their

predecessors, the new parties were built from the bottom up, not from the top down. Strong state and local parties, and close relations between the national, state, and local levels from the first were essential to a vital party system and substantial popular participation.

- Local and state committees and clubs were conspicuous in the party-building process. Township committees of 200-400 were not uncommon; Clinton County, Ohio, with about 2,000 voters, had a Jackson Democratic Committee of Correspondence with 72 members, and a hundred-member-strong Committee of Vigilance.

- State leaders such as New Yorkers Martin Van Buren for the Democrats and Thurlow Weed for the Whigs played central roles in the rise of their parties.

- Local leaders set the rules for access to caucuses, conventions, and primaries.

- The parties printed and distributed their own ballots.[4]

12. The competitive electoral pressures imposed by the Constitution led to intense party efforts to recruit new voters and bring existing supporters to the polls:

[*6] - In the early years of the century, New York Federalists supported free black voting; Republicans sought eased voting requirements for immigrants.

- White males without regard to religion or property could vote by the 1830s, as state constitutions such as those of New York and Virginia were revised.

- The election of 1840 saw a massive expansion of devices--pamphlets, political artifacts, symbols such as the log cabin to denote Whig William Henry Harrison's humble

origins--designed to heighten turnout. Participation rose from 27% of eligibles in 1824 to 78% in 1840.

▪ After his retirement from politics in 1848, Martin Van Buren, Jackson's presidential successor and one of the creators of the Jacksonian Democratic party, wrote a treatise arguing that mass, national political parties were the natural instruments of democratic politics.[5]

13. The parties were called on to mediate among the multitude of local, state, regional, economic, and social interests concerned with major issues such as slavery, the territories, the tariff, and states' rights, that from the earliest days of the United States threatened to rend the Union. For some decades they managed to do so.

▪ The Missouri Compromise of 1819, which secured almost thirty years of political peace in the settlement and state-making of the Louisiana Purchase, was the work of party builders such as the future Whig leader Henry Clay. Ideologues such as John Randolph and John Taylor of Virginia, with weak party attachments, opposed it.

[*7] ▪ Jackson stopped the incipient secessionist nullification movement of 1831 in South Carolina, rallying his still-young Democratic party to oppose the separatist effort led by his Vice President, John C. Calhoun.

c. The Crisis of the Party System, 1848-1865

14. While the election provisions of the Constitution all but required a two-party system, and a democratic politics called for close connections between local, state, and national party organizations, the realities of American life subjected that system to increasing strain. State and sectional loyalties warred with the idea of a political party as a national institution.

15. Two parties appeared to be essential to the functioning of the Constitutional system. But it was not initially evident that they had to be permanent parties. The Federalists, on the wrong side of the War of 1812 and slow to adapt to an increasingly democratic, inward-looking American society, faded away after 1815, eventually to be replaced by the Whigs. The same thing happened to the Whigs in the 1850s, with far more serious consequences.

16. As the parties' ability to temper ideological extremes and to act as intermediaries between local, state, and national politics and government eroded, the federal government and Congress were less and less able to cope: not only with slavery, the territories, and states' rights, but with more mundane issues such as the disposition of the public lands and the tariff. Congress was described in the 1850s as "a cave of the winds"; this was a time, said a later commentator, when "the springs of government were weakened everywhere."[6]

17. Public policy abhors a vacuum. As the parties' capacity to define issues declined, other voices--third parties, single-issue advocates, special-interest pressure groups--filled the gap.

▪ The American Temperance Society, founded in 1826, was one of a number of anti-alcohol groups that made the issue of drink a significant [*8] one in antebellum American life. But as this movement went from a call on individuals to take pledges of temperance, to advocating prohibitory state and local laws, the parties found it difficult to deal with so divisive an issue.

▪ Anti-immigration and anti-Catholicism, women's rights, education and prison reform, and opposition to imprisonment for debt and against capital punishment were other issues taken up by a host of advocacy organizations.

National parties, obliged to appeal to as wide a constituency as possible, were ill-fitted to deal with the challenges they posed.

- The most consequential issue to be defined increasingly by advocacy groups outside the party system was, of course, slavery. Organizations such as the American Anti-Slavery Society and the League of United Southerners, and advocates such as abolitionists William Lloyd Garrison, Wendell Phillips, and John Brown and proslavery proponents Hinton R. Helper, Robert Rhett, George Fitzhugh, more profoundly influenced antislavery sentiment in the North and proslavery and secessionist sentiment in the South than did party leaders.

- Both groups were contemptuous of the party process. Abolitionist Samuel May, Jr., observed: "Party organization, drill, and machinery are worthless"; Alabama secessionist leader William Yancey declared: "If this foul spell of party which binds and divides and distracts the South can be broken, hail to him who shall break it."

[*9] - Third parties flourished in an increasingly fractious political environment. The pioneering model was the Anti-Masonic Party of the late 1820s, opposed to what it saw as pervasive special privilege growing in America. The most consequential third parties were the antislavery Free Soilers of the 1840s and the nativist Know-Nothings of the 1850s. The Know-Nothings had a major role in the disintegration of the Democratic-Whig party system during the 1850s.[7]

18. The culmination of these developments was the 1860 election, in which four major candidates, each with a distinct regional/ideological appeal (Republican Abraham Lincoln, to the antislavery North, Stephen Douglas, to Northern Democrats; John C. Breckinridge, to Southern Democrats, Constitutional Union candidate John Bell, to the border states), faced each other. The election of Lincoln with

under 40 percent of the popular vote led directly to secession and civil war.

19. The combination of weak national parties, and third parties and advocacy groups more narrowly based in terms of issues, geography, or popular appeal, was a major factor in the coming of the Civil War. The prospect of some resolution of the issues of slavery and Union short of the bloodiest war of the nineteenth century was substantially reduced by the displacement of the major parties as the primary makers of national policy.[8]

20. By the same token, Lincoln's success in expanding the Republican party to include a wide range of pro-Union Northerners significantly strengthened the Union war effort.

d. The Age of Machine Politics, 1865-1930

21. After the Civil War, American political parties followed a very different trajectory. For almost a century and a half, the same two parties, the Republicans and the [*10] Democrats, have dominated American politics. Only in 1912 would a third party outdo one of them in popular and electoral votes.

22. What were the sources of the major parties' staying power? For one thing, they stressed issues designed to win and hold the support of large-scale coalitions of voters, but not of the sort that would too deeply rend the body politic.

- The Republican themes of patriotism, piety, and prosperity through a protective tariff, secured for decades the allegiance of a broad sweep of the Northern and Western middle class, farmers, workers, and non-Catholic immigrants.

- The Democrats' commitment to a laissez-faire state, free trade, and local government appealed both to Southerners and urban Catholics.[9]

23. Issues and ideology were effective party-sustaining devices because they went hand in hand with a high degree of party organization.

- Much of the success of the early Republican party was due to the close working relationship between the Republican National Committee and strong state parties.

- The state parties were the senior members of this partnership: they were, for example, free to decide how to choose delegates to the national conventions. The conventions themselves--massive affairs designed to foster party loyalty and enthusiasm--were forums in which state and national leaders chose the party's candidates and issues.

- State, city, and local party **machines** were run by an increasingly professional class of **bosses**: words that came into political use during the **[*11]** 1850s, but flowered after the Civil War. A contemporary called the party politicians "majority manufacturers." And indeed they were the political counterparts of the industrialists who were transforming the American economy along not dissimilar lines.[10]

24. This fusion of ideology and organization made campaigning much more labor- and cost-intensive. The parties responded to this challenge in a variety of ways:

- The party in power relied heavily on government workers in post offices and customs houses to take on political work.

- Friendly newspapers were rewarded with printing contracts.

- Northern Civil War veterans' loyalty to the GOP was secured through an elaborate pension system. Veterans' pensions consumed 34 percent of the federal budget in 1890: in effect a massive, party-created welfare program.[11]

25. Parties with broadly attractive ideologies, run by well-financed machines and bosses, produced uniquely high voter turnouts. Though vote fraud was not uncommon, in the late nineteenth century the percentage of qualified voters who cast their ballots, and did so on straight party lines, was the highest in American history.

- The intensity of party organization was reflected in the closeness of presidential election margins: 10,000 of almost 9 million cast in 1880, 13,000 of almost 10 million cast in 1884, 95,000 of almost 11 million cast in 1888.

- The parties increasingly relied on the education of voters through leaflets, pamphlets, and campaign speakers. The Republicans distributed 13 **[*12]** million pieces of campaign literature in 1872, and several hundred million pieces (and 1,400 hired speakers) in 1896.[12]

26. In order to function as the major instruments of politics and government in a large, complex society, the parties had to rely on substantial funds and close ties between their local, state, and national organizations.

- Marcus Hanna brought the fund-raising capacity of the Republican National Committee to a peak in 1896, when corporate campaign contributions for the first time became a significant element in a presidential campaign.

- While the National Committees became a major source of campaign funds, the voice of state and local party organizations remained strong, since influential Congressmen and Senators tended to have deep local and state political roots.[13]

27. As the post-Civil War parties solidified their position, the more overt forms of corruption--patronage, vote-buying, fraudulent counts, payments to journalists and newspapers--declined. Large issues--free silver, imperialism,

the trusts--came to be the prime determinants of American politics around the turn of the century.

28. For all the changes in American politics and government during the Progressive era of the early twentieth century, the post-Civil War party system retained its predominant place in the political system.

- Theodore Roosevelt's New Nationalism and Woodrow Wilson's New Freedom, programs which set the terms for the development of a more active American state, drew heavily on their respective party ideologies. **[*13]** Roosevelt advocated a strong national state and regulation rather than the breakup of big business. Wilson was more strongly inclined to old Democratic themes: anti-monopoly, a low tariff, and hostility to banks and other financial interests.

- Third parties such as the Populists helped to bring new ideas--the income tax, the direct election of Senators--into American political life. But the major parties, with their complex local, state, and national structures and their established presence in Congress, continued to dominate the opinion formation, voter mobilization, political wheeling and dealing, and presidential and Congressional leadership that made possible legislative achievements such as the Sherman and Clayton Anti-Trust Acts, the Income Tax Amendment, and the Federal Reserve Act.[14]

29. Some of the more destructive policies and political movements of the early twentieth century were the work of ideological coalitions that transcended the normal party process:

- Prohibition's political momentum came not so much from the parties, as from advocacy and special interest groups such as the Anti-Saloon League (arguably the most successful advocacy organization of the early twentieth century), which exerted pressure on Southern Democrats and

Midwestern Republicans to confront an issue that most national party leaders preferred to avoid. The result was a national policy with such negative consequences that in little more than a decade the Constitutional amendment that made it possible was repealed.

[*14] - The Smoot-Hawley Tariff of 1930, generally considered a contributing cause of the Great Depression, was also the product of a welter of particular interests--state and regional, agricultural, manufacturing, and labor--unmediated by the parties and opposed by most informed national opinion.[15]

- The Ku Klux Klan, which briefly attained considerable local and state power in the 1920s, sought to take over the Democratic party in the South and the Republican party in the Midwest and West. The parties' need to appeal to the widest possible electorate played a significant role in the Klan's demise.

e. The Parties and Modern America: High Noon, 1930-1970

30. The Great Depression and World War Two did not diminish the central role of the major parties in American politics and government.

- The New Deal was shaped more by the interests and ideas of FDR's Democratic party (he once defined himself as a Christian and a Democrat) than by extra-party ideologues and ideologies.[16]

- The Republican response to the New Deal was not so much a repudiation as a critique. Its presidential candidates from Alfred Landon and Wendell Willkie to Thomas Dewey and Dwight Eisenhower sought constraints on, rather than the rejection of, the Roosevelt Revolution.

▪ The same would be true of major postwar domestic policy developments: most notably, the civil rights revolution, and modern public policy in realms such as poverty, the environment, education, and immigration.

[*15] ▪ Party competition was a major force behind the expansion of the electorate through the enfranchisement of Southern blacks, reduction of the voting age to 18, and the elimination of poll taxes and other constraints on voting registration, as it had been in the early nineteenth century.[17]

31. The American Political Science Association recognized the continuing primacy of the major parties when in 1950 it published "Toward a More Responsible Party System."

▪ That document argued that the parties should become more programmatic, more open to intra-party diversity through primaries, and should foster closer links among its national, state, and local units.

▪ It called also for the repeal of "statutory limitations" which "work toward a scattering of responsibility for the collecting of funds among a large number of independent party and nonparty committees."[18]

f. The Parties and Modern America: Challenge, 1970-2000

32. The second half of the twentieth century would see not the implementation of this blueprint for greater party effectiveness, but (especially since the 1970s) a decline in the major parties' power over the electorate.

▪ Political parties, like all major American institutions, faced growing public skepticism during the late 1960s and the 1970s. The percentage of eligible voters participating in elections continued to decline.

▪ Their ability to command long-term, straight-ticket voter loyalty lessened during the second half of the twentieth century. There has been a commensurate increase in the proportion of voters who define themselves **[*16]** as independents. And access to the ballot by third parties has become much easier.

▪ The jobs and benefits of the New Deal initially strengthened the old boss—machine system. But the rise of the welfare state and the great trek to suburbia has led to that system's demise. Party patronage has all but disappeared, due to legislation and judicial decisions.

▪ Congressmen tend increasingly to their own fund-raising, and once in office rely on constituency services that draw not so much on the resources and connections of the party machine as on government itself. Presidential campaigns also are more autonomous with regard to the parties.

▪ Advocacy groups depend less on parties, and more on the media and their own public relations, to influence public opinion and public policy. With the rise of the courts as major players in the policy game, these groups have found an attractive alternative to the slower, less dependable process of a party-dominated polity.

33. It is understandable that one observer could conclude that "the party's over." Nevertheless the parties remain central to our Constitutionally prescribed system of elections. And more than ever, they are uniquely fitted to be "inclusive fora for public deliberation on the full range of issues on the public agenda."[19]

34. Now as in the past, the parties face the need to respond to the new realities of American political life. The primary challenges facing them are:

- to expand and solidify their bases of electoral support by raising and spending the funds necessary to reach a vast, TV-dependent electorate;

- to avoid the consequences of narrowly based advocacy groups--Madison's factions--taking command of the parties. The disastrous candidacies of Barry Goldwater in 1964 and George McGovern in 1972 are cases in point.

III. The Parties and Corruption

35. I turn now to an examination of the place that corruption has played in the history of American political parties, and offer a judgment as to its relative importance in politics today compared to the past.

a. Corruption and the Pre-Civil War Parties

36. Political corruption was hardly unknown in colonial America. A major theme in the movement for independence was the desire to escape from the aristocratic corruption of Old Regime England, where office was considered a form of property rather than a public trust. The Founders highly valued probity--virtue--in office. But this did not keep mutual accusations of corruption from being an integral part of party politics from the Republic's earliest days.[20]

37. The emergence of a democratic politics added new dimensions to political corruption:

- Nineteenth century public works--canals, railroads, government contracts, the infrastructure of the growing cities--greatly expanded the potential for the intermingling of money and politics.

- The characteristic forms of corruption in the age of democratic party politics--patronage, officeholder kickbacks, massive overpayments to **[*18]** contractors--were

well in place before the Civil War, especially during the decade of the 1850s.

- The 1860 Covode investigation into charges of corruption in the Buchanan administration was the first such inquiry. It set the tone for its successors in that it was intensely partisan: Covode was a Pennsylvania Republican, Buchanan's was a Democratic administration.[21]

- While accusations of corruption were common in the pre-Civil War era, and during the war itself, the leading student of the subject thinks its pervasiveness is exaggerated: "The closer the Civil War era is inspected, the more unclear the extent and the less obvious the uniqueness of the corruption seem."[22]

b. Corruption and Reform in the Boss-Machine Era

38. The late nineteenth century--the Gilded Age--is commonly regarded as the high point of American political corruption. Major scandals, which reflected the new prospects for graft provided by a growing government and economy, included:[23]

- Credit Mobilier, in which leading politicians received stock in the Union Pacific Railroad's construction company;

- the Whiskey Ring, a web of collusion between Internal Revenue agents and distillers to avoid a federal excise tax;

- the Star Route scandals, where lucrative western mail delivery franchises were given to favored contractors;

- the spectacular corruption of organizations such as the Tweed Ring and the Pennsylvania Republican

machine, which had counterparts in city halls and state houses across the nation.

[*19] 39. The true extent of corruption--the degree to which charges of malfeasance were real or the unsubstantiated rhetoric of party warfare--is debated by historians.[24] But it was enough to lead to a growing assault on party machines and bosses as corruption's primary source, and added up to a substantial body of legislation designed to lessen corruption, regulate nominations and elections, and increase the transparency of fundraising.

- Civil service reform was touted as a way of eliminating political patronage and the use of government workers for party purposes. A long series of civil service laws began with the Pendleton Act of 1883.

- State legislatures from the 1870s on regulated the political parties' nominating procedures, provided for primaries, and defined the character and rights of party membership.

- By the early 1900s the Australian ballot--state-printed, secretly cast, a severe blow at the ability of the parties to manipulate election results--was widely adopted by the states.

- In 1907, Congress passed the Tillman Act banning corporate campaign contributions, the first law regulating federal elections since Reconstruction. It was expanded in 1910 and 1911 to include financial disclosure requirements and set expenditure limits on pre-primary campaigns.

- In the wake of the Teapot Dome scandal Congress passed the Federal Corrupt Practices Act of 1925, which strengthened disclosure requirements and expanded the definition of illegal campaign contributions.

- The Seventeenth Amendment (1913), providing for the direct election of Senators, and the Nineteenth Amendment (1919), enacting woman's suffrage, were designed not only to expand popular participation but to purify the political process (by ending the practice of millionaires or party machines securing Senate seats from acquiescent state legislators, and under the assumption that women voters would be more likely to react to corrupt politics).

- The reform impulse led also to the initiative and referendum provisions adopted by a number of Western states, and the proportional representation voting systems instituted by some medium-sized cities.[25]

c. Corruption and Reform in the Modern Era

40. From the 1930s to the 1970s, political reform was more concerned with the improper use of political influence than with voting, elections, or campaign financing. But as before, the net effect was to add to the disclosure and other requirements that were making politics one of the most highly regulated of American institutions.

- The Foreign Agents Registration Act of 1938 required representatives of foreign firms or governments to disclose their employer and their remuneration.

- The Hatch Act (1939) extended civil service reform by prohibiting political activity by federal employees. This was a Congressional response to the rise of a greatly expanded federal bureaucracy during the New Deal.

[*21] 41. Since the 1970s, legislative oversight of the political process has reverted to the major concern of the late nineteenth and the early twentieth centuries: the role of money in elections.

- In the Progressive-New Deal tradition, the Federal Election Campaign Act of 1971, as amended in 1974, established a new government agency, the Federal Election Commission, to regulate campaign finance.

- Extensive state and federal legislation has been passed to require disclosure by the parties, candidates, and government officials of the receipt and expenditure of funds, and the activities of lobbyists. These include the Federal Ethics in Government Act of 1987, the Ethics Reform Act of 1989, and the Lobbying Disclosure Act of 1995 (replacing the failed Federal Regulation of Lobbying Act of the early 1950s).

- This legislative infrastructure imposed strong disclosure provisions and elaborate regulatory requirements on the electoral process and the behavior of government officials. Detailed "gift" rules (such as those defining "widely attended events" and "nominal refreshments") are part of this regulatory regime, which includes as well a substantial body of Senate and House ethics rules.

- Every state today has some form of campaign finance and lobbying disclosure statute. Most states limit the size of individual campaign contributions. The states have enacted, and continually update, regulations covering conflicts of interest, ethics, gifts, and the interaction of officeholders with their constituents.

[*22] 42. This modern reform effort has been directed at the major political parties more than at increasingly powerful advocacy and other special interest groups. It has not reduced the role of money in modern American politics.

- Political action committees (PACs) have rapidly grown in numbers. In 1970, the leading PAC was that of the AFL-CIO, dating from 1944. By March 31, 2002, there were 4,328 federal PACs.

- The number of lobbyists has steadily risen, and major interest and advocacy groups pour money and personnel into election campaigns. But these have not been the chief targets of modern campaign regulation. My understanding is that advocacy groups do not face the same disclosure requirements imposed on political parties, and as a result their political activities are far less transparent than those of the parties.

43. It is worth asking why the political process, and fund-raising in particular, has come under such close scrutiny in recent decades. While the cost of elections has steadily risen since the Second World War, there is no evidence that the election process has become more corrupt. Indeed, the opposite is true. The modern electoral process--highly regulated, supervised, transparent, and reliant on difficult-to-tamper-with mechanized voting--is less subject to traditional forms of corruption than in the past.

44. Patronage, kickbacks, the assessment of officeholders, and outright legislative bribery--the mother's milk of the boss-machine era--still exist. But these are minor problems, and when they occur they usually are exposed by the media and/or are vigorously prosecuted by such bodies as the Public Integrity section of the Department of Justice or by state attorneys general.

[*23] 45. In my judgment it is historically inaccurate to see corruption in its traditional sense as a major problem in contemporary American politics.

- The elaborate structure of regulation, oversight, and disclosure that has come into being over the past century and more, and basic changes in the conduct of politics from the decline of bosses and machines to the rise of television-based campaigning, have consigned most of the traditional forms of corruption to the margin of American political life.

- That this extended, extensive reform effort has failed to stem a rising level of electoral expenditure reflects not pervasive political corruption, but the fact that large financial resources are essential to the parties' ability to function in the American constitutional order. As was aptly observed in Buckley v. Valeo: "Virtually every means of communicating ideas in today's mass society requires the expenditure of money."

IV. BCRA and the Parties

46. I have been asked to assume that BCRA will have the following effects on the political parties:

- BCRA will disrupt the ability of national, state, and local party committees to work together. It will do so by prohibiting them from cooperating on non-federal fund-raising, and by forbidding the national party committees from transferring non-federal funds to state or local parties, or contributing such funds to state or local candidates.

- After BCRA comes into effect, interaction between the national, state, and local party levels, and between federal officeholders and candidates and their state and local counterparts, will decrease.

[*24] - By prohibiting national party committees from raising and spending non-federal funds, and restricting the ability of state and local party committees to raise such funds, the parties will be placed at a disadvantage in raising and spending funds compared to special interest groups such as corporations, trade associations, and tax-exempt advocacy organizations.

- National party committees will be required to pay for "associational" activities (such as communications with supporters and members) with funds raised under strict limits on their source and amount. But corporations, trade associations, and tax-exempt advocacy groups will be able to

use funds not subject to such limitations to communicate with their members, stockholders, and employees.

47. On the basis of these assumptions, I find that the historical record supports the following propositions:

- BCRA will make more difficult the access of the modern parties to the funding necessary for them to perform their time-honored role of mediating among varied interests and presenting party positions and candidates to a vast, difficult-to-reach public.

- BCRA's effort to erect a Chinese Wall between the national and state parties also will harm the parties' ability to fulfill their prescribed role in our political system. When links between the national, state, and local party organizations were strongest (as in the 1830s and the 1840s, the late nineteenth century, or during the New Deal), popular interest in public affairs was at its most robust. When those links were weakened, as in the [*25] Era of Good Feelings after the War of 1812, the 1850s, the Progressive Era, or most recently in the 1970s, the effectiveness of the parties in communicating to the public declined. The correlation between weakened parties and low turnouts in recent decades is not coincidental.

- There is ample historical reason to hold that close links between state and national parties are to be encouraged, not made more difficult. The GOP's 1994 Congressional victory was based on a high degree of national and state party cooperation. The fact that four of the nation's last five chief executives (Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush) were state governors before they became President testifies to the continuing importance and vitality of the federal-state relationship.

48. In addition, BCRA is notable for its failure to deal with the two major problems that, from a historian's perspective, face the contemporary American political system.

49. The first of these is low voter turnout, accompanied (and fostered) by skepticism verging on distrust of electoral politics.

- Limits on the parties' ability to raise, transfer, and spend non-federal funds will hardly help them to counter that trend. The new-style campaigning of candidate-centered television is at least as expensive as old-style campaigning through strong party organizations; and the size of the potential electorate to be reached keeps growing. The cost of modern campaigning does not seem outsized when one compares it to other forms of mass selling in modern America. The idea that restrictions on campaign fund raising (which is likely to have more of an adverse impact **[*26]** on challengers than on incumbents) will lead to greater public belief in and participation in politics, finds no support in the historical record.[26]

50. The second great problem in contemporary American politics is the degree to which the traditional issue-defining role of the major parties has been supplanted by other, more narrowly based interests.

- The growing influence of PACs and advocacy groups is one consequence of this development.

- Another is the discomfort of the parties with issues largely defined by special interest groups, such as abortion, gun control, education, and gay rights.

- Far from addressing this situation, BCRA's restrictions on non-federal fund raising are likely to weaken the parties relative to interest and advocacy groups, and thus their ability to bring these groups--Madison's "factions"--into some larger, tempering accord.

51. There are, of course, other reasons for the ebb and flow of voter interest. One-party states and a politics light on issues dampen popular political participation. But this only

reinforces the argument for strengthening, not weakening, the capacity of the parties to integrate their national, state, and local organizations, and to be able to convey their message to as large an audience as possible. To do otherwise is to reduce the capacity of the parties to adapt to the political demands of modern American life.

[*27] V. Conclusion

52. My review of the history of American political parties, of attempts to regulate them, and of BCRA's relationship to that record, leads me to the following conclusions:

- The Constitution did not specifically provide for parties. But it made the two-party system inevitable and inescapable, as more than 200 years of subsequent American history have amply demonstrated.

- To constrict the parties' access to funds, their ability to organize effectively on the local, state, and national levels, and their freedom to participate in election campaigns, is to strike at their ability to meet the responsibility in effect set for them by the Constitution: to mediate among interests and factions, and bend public policy toward a larger, national interest.[27]

53. Over the course of American history, the strength of the parties has waxed and waned. And so, in close concordance, has the health of American democracy.

- During the Era of Good Feelings after the War of 1812, the parties were weak--and voting was scant.

- The revival of the two-party system by the Jacksonian Democrats and the Whigs stimulated a massive increase in voter turnout, and a much richer range of issues.

- When the major parties weakened under the impact of the controversy over slavery and Union, and gave way in policy formulation to the media, advocacy groups, and narrowly based third parties, the ability of American democracy to resolve those issues eroded. The Civil War was the **[*28]** culmination of the greatest failure in the history of American politics and government.

- The parties during the late nineteenth and early twentieth centuries may be faulted for having reacted inadequately to racism and the welfare needs of a modern industrial society. But they played a crucial role in tempering religious and ethnic conflict during the late nineteenth and early twentieth centuries.

- The major American Presidents of the twentieth century--Theodore Roosevelt, Woodrow Wilson, Franklin D. Roosevelt, John F. Kennedy, Ronald Reagan--made their mark as leaders of their parties, using party structure and ideology to create effective voting coalitions and enact their programs.

- In more recent times the ability of the parties to perform their traditional mediating role has been substantially challenged: by the narrowly ideological campaigns of Barry Goldwater in 1964 and George McGovern in 1972, by the impact of the Watergate scandal and the general Vietnam Era disillusion with politics. Weakened parties became part of the malaise in American life so evident in the 1970s, with its accompanying maladies of declining voting and growing social discord.

54. Now, at the beginning of the twenty-first century, the major problems facing the parties--and American democracy--are the declining level of voting, and the growing influence of the media and advocacy groups. BCRA responds to neither of these concerns.

55. My judgment as a historian is that "corruption or the appearance of corruption," the primary justification for BCRA, is less of a problem in American politics today than at any time in the past.

- The American system of campaign financing and elections has been subject to more than a century of statutory and judicial oversight, resulting in extensive supervision, disclosure, and transparency.

- The major forms of past political corruption--vote buying and fraudulent voting and counting; kickbacks from public employees and government contractors; the widespread use of patronage--are far less prevalent than in the past, and are subject to a dense system of oversight, disclosure, and susceptibility to the criminal process.

- The diversity of financial contributions to parties is itself a check on the influence of special interests. In addition, these contributions differ fundamentally from the kickbacks, bribes, and vote fraud that historically have defined political corruption: not least because regulating them raises questions of access and free speech that traditional corruption did not.

56. It is my judgment that, on the basis of the historical record, BCRA is likely to harm rather than assist the parties in adapting to the demands of a changing American society.

- The parties need to more closely integrate their national, state, and local levels in order to develop their message and mobilize voters. BCRA will constrain their ability to do so.

- The parties need to secure the funds necessary to convey their message and mobilize voters in a society where the costs of doing so of necessity **[*30]** are ever larger.

BCRA is likely to add to the constraints on party fundraising and hamper parties' ability to raise the necessary funds.

57. The historical record makes it clear that when there are constraints on the parties, other voices--the media, interest and advocacy groups--grow proportionately in influence. James Madison wisely warned of that danger more than two hundred years ago. Political parties over the course of our history have been the institution that has done the most to avoid government by faction; to weaken them is to increase the danger of that happening.

■ This caveat is especially in order when one considers the unintended consequences of previous campaign finance legislation: the growth of PACs and more powerful advocacy and interest groups. On the basis of this historical record, it is reasonable to expect BCRA to have similar results.

58. It may be argued that the parties do not, and never have, performed their historical function very well. But my conclusion is that they are, to use Winston Churchill's comment on democracy, "the worst form of government except all those other forms that have been tried from time to time."

I declare under penalty of perjury that the foregoing is true and correct.

s/
Morton Keller

Executed on September 22, 2002

[EXHIBITS OMITTED]

[1] Richard Hofstadter, The Idea of a Party System ch. 2 ("A Constitution against Parties"), 80-86 (1970); James A. Gordon, "Can Party Politics be Virtuous?, Colum. L. Rev. 667-668 (2000) (for examples of the Founders' anti-party sentiment).

[2] William N. Chambers, Political Parties in a New Nation (1963) and James R. Sharp, American Politics in the Early Republic (1993) (on the rise of the party system).

[3] On cadre parties, see Chambers, supra note 2; on leadership, John H. Aldrich, Why Parties? 4 (1995)

[4] Alexander Keyssar, The Right to Vote 39-40 (2000); Morton Keller, Reflections on Politics and Generations, Daedalus (Fall 1978) 123-35 (on political language).

[5] See discussion in Hofstadter supra note 1, at 223-26; Chilton Williamson, American Suffrage (1960); Martin Van Buren, Inquiry into the Origin and Course of Political Parties in the United States (1867); Aldrich, supra note 3, ch. 4-5; Keyssar, supra note 4, ch. 2.

[6] James S. Young, The Washington Community (1966); Wallace Farnham, "The Weakened Spring of Government": A Study in Nineteenth-Century American History, 68 Amer. Hist. Rev. 662-90 (1963).

[7] Michael Holt, The Rise and Fall of the American Whig Party (1999), Joel Silbey, the American Political Nation, 1838-1893 (1991), and the Michael Holt, The Political Crisis of the 1850s (1978) are the best accounts.

[8] David Donald, An Excess of Democracy, in Donald, ed., Lincoln Reconsidered 209-235 (1961).

[9] Morton Keller, Affairs of State (1977) 552-564.

[10] Robert D. Marcus, Grand Old Party 22-25 et seq. (1971); Keller, supra note 11, 240.

[11] Keller, supra note 9, 311.

[12] Keller, supra note 9, 583.

[13] Marcus, supra note 12, 138-140, 245-250; Morton Keller, The Life Insurance Enterprise (1963) (on campaign contributions by large life insurance companies).

[14] Morton Keller, Regulating a New Economy (1990), ch. 2, 9.

[15] Morton Keller, Regulating a New Society 133-139 (1994); Keller, supra note 14, 198-199.

[16] Arthur M. Schlesinger, The Age of Roosevelt (1956-60).

[17] Keyssar, supra note 4, ch. 8.

[*32] [18] American Political Science Association, Toward a More Responsible Two-Party System, 44 Amer. Pol. Sci. Rev. 45 (Supp.) 1950), 11.

[19] Ronald N. Johnson and Gary B. Libecap, Courts, A Protected Bureaucracy, and Reinventing Government, 37 Ariz. L. Rev. 791 (1955) (on judicial destruction of remnants of patronage system); David Broder, The Party's Over (1972); Nancy L. Rosenblum, "Political Parties as Membership Groups," 100 Colum. L. Rev. 813 (2000)

[20] Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (on corruption theme); Morton Keller, "Corporation in America," in Abraham S. Eisenstadt et al., ed's., Before Watergate (1978), 7-19.

[21] Mark W. Summers, The Plundering Generation (1987) 257-259.

[22] Mark W. Summers, The Era of Good Stealings 16 (1993).

[23] Keller, supra note 9, at 243-46; Summers, supra note 22.

[24] Keyssar, supra note 4, at 159-60, Peter Argersinger, New Perspectives on Election Fraud, 100 Pol Sci Q. (1985-86) 669-87 (on exaggeration of corruption).

[25] Keller, supra note 9, at 242-43, 524-31; Adam Winkler, Voters' Rights and Parties' Wrongs: Early political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev. 873-899 (2000); Keyssar, supra note 4, ch. 5; on the Tillman Act., Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters," 69 U. Chi. L. Rev. 1128-35.

[26] Stephen Ansolabehere and James M. Snyder, Jr., Soft Money, Hard Money, Strong Parties, 100 Colum. L. Rev. 598 (2000) (on likely adverse effects on voter registration and other party activities of soft money ban).

[27] Rosenblum, supra note 19 (distinguishing political parties from business and adversary groups, the media, and professional associations as uniquely committed to making democracy work by providing a forum for the full range of issues and mollifying ideological conflict).

[1 (DEV. 1-Tab 2)] **Evaluating the Bipartisan Campaign Reform Act (BCRA)**

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We write this report because we believe that our research and that of other political scientists speaks directly to issues in *McConnell v. FEC*, Civil Action No. 02-582 (D.D.C.) (including all consolidated cases). We hope the theoretical and empirical issues that we and other scholars have wrestled with in studies of public opinion, political parties, campaign finance, elections, and related subjects will be helpful to the courts as they seek to maximize electoral integrity and personal freedom in this case. To be more specific, we believe that a careful analysis of the empirical issues raised in this case provides very strong reason to support Congress's and the President's judgment and uphold the Bipartisan Campaign Reform Act of 2002 ("BCRA").

We must be clear from the outset that we limit our consideration of the BCRA to its two main components: the ban on the use of soft money donations by the national parties (extending to state and local committees with regard to federal elections), and the more realistic dividing line between electioneering and issue speech BCRA provides over the Federal Election Campaign Act ("FECA"). We are satisfied that the other pieces of the bill do not in any way conflict with our analysis of these two sections. While the soft money and electoral communications provisions are separate, our examination shows that they are highly complementary. For example, the notable rise in the national parties' soft money receipts in the last three election cycles

from $86.1 and $101.6 million in 1991-2 and 1993-4 to $262.1, $224.4, and $495.1 million in 1995-6, 1997-8 and 1999-2000 was [2 (DEV. 1-Tab 2)] fueled largely by the parties' ability to air candidate-oriented or electioneering "issue ads" with this money.[1] Though our analysis reveals the value of each provision by itself, in this case the whole is greater than the sum of its parts, a point we will demonstrate in greater detail below.

To address the major issues raised in this case we have organized our discussion into three parts. The first deals with soft money, the second with issue advocacy, and the third with the interaction between the two. In part one we initially speak to one of the core constitutional issues in this case, corruption and its appearance, then turn to two topics important to the jurisprudence on campaign finance: the impact of BCRA on political parties and on voter turnout. Part two begins with a description of issue advocacy in the 1998 and 2000 elections and an analysis of the free speech implications of BCRA's definition of issue advocacy, then proceeds with an examination of the corruptive potential of issue advocacy under the current system. Finally, part three addresses the interactions between BCRA's two halves and concludes by summing up the main findings and our view of BCRA. Our discussion is heavily informed by a variety of empirical data ranging from FEC reports, campaign finance information from several states, tracking of television advertising, polls, an array of declarations and depositions, and press reports. As political scientists concerned with the health of American democracy and its electoral system, we find it reassuring that our examination of these data lead us to

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[1] Federal Election Commission, *FEC Reports Increase in Party Fundraising for 2000, at http://www.fec.gov/press/051501partyfund/051501partyfund.html* (May 15, 2001).

conclude that BCRA is a reasonable response to a clear threat to the integrity of our electoral system and is likely to have little or no harmful impact on free speech rights, political parties, or voter turnout.

[3 (DEV. 1-Tab 2)] I. Soft Money

A.Corruption

A1. Defining corruption

In applying the term "corruption" to campaign finance practices one immediately encounters both a variety of definitions and an evolving sense of how the public and politicians have come to view campaign financing. On the latter point, two leading scholars observe:

> A generation ago, few people would have questioned the propriety of contributions to political candidates; the dominant belief used to be that those who felt strongly about electoral outcomes were entitled to contribute time, resources, and funds to get their candidates elected. . . . Public attitudes and norms have changed so much that politicians, for fear of appearing corrupt, are unwilling to acknowledge that large campaign contributors receive special favors or consideration. The politically correct position is that large contributors only obtain greater "access" to the candidate/politician.[2]

Putting aside public perceptions for the moment, we are left with various versions of corruption from case law and congressional debate. The most restrictive of these would limit its meaning to explicit quid-pro-quo bribery, while the more expansive one, typified by the term "privileged access,"

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[2] Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity* (Chicago: University of Chicago Press), 1996, p. 5-6.

emphasizes unequal opportunities to influence policy-makers that accrue to big financial players. Another form of corruption, often called "undue influence," lies somewhere in between bribery and unequal access. In this version, well-financed actors exercise disproportionate influence on policy not through the existence of explicit quid-pro-quos arrangements but through the implicit understanding that a legislative vote or administrative action might generate financial support or opposition from a moneyed interest.

[4 (DEV. 1-Tab 2)] How to choose among these alternatives? The floor debates over BCRA and its 1974 predecessor, FECA, clearly indicate that members of Congress believe corruption encompasses both undue influence and unequal access. The Congressional Record is full of references to members' concern over their meetings with large contributors and the potential for influence that this face-to-face contact breeds. The Supreme Court appears to have a similar view. For example, in *Nixon v Shrink Missouri Government PAC* the majority notes directly that:

> In speaking of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.[3]

And, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* the Court expresses concern about privileged access by noting that parties often serve as "matchmakers whose special meetings and recep-

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[3] 528 U.S. 377, 389 (2000).

tions give donors the chance to get their points across to candidates."[4]

This perspective is consistent with the one we adopt and other political scientists adopt and reflect in their research. Political influence has been a source of abiding concern since the inception of the discipline. Political scientists, who lack the resources to investigate bribery anyway, assume a broader approach to conceptualizing influence, recognizing that it derives from different resources and is exercised in subtler, less legalistic, ways. Thus it is no surprise that the availability of data on campaign contributions following 1974 spawned a sizable literature measuring their statistical effect on various behaviors like legislative voting, bill sponsorship, and activity in [5 (DEV. 1-Tab 2)] subcommittees.[5] By and large, these studies conclude that contributors may succeed in influencing policy in some areas, particularly on arcane questions of little interest to the broader public but of great import to a narrow group of involved citizens, corporations, unions and other organizations. Former SEC chairman Arthur Levitt's recent claim that substantial donations by

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[4] 533 U.S. 431, 461 (2001).

[5] For instance, see Janet M. Grenzke, "PACs and the Congressional Supermarket: The Currency is Complex," (*American Journal of Political Science* 33:1-24), 1989; John R. Wright, Contributions, Lobbying, and Committee Voting in the U.S House of Representatives," (*American Political Science Review* 84:417-38), 1990; John R. Wright, "Political Action Committees, Campaign Contributions, and Roll Calls: An Organizational Perspective," (*American Political Science Review* 79: 400-14), 1985; James B. Kau and Paul H. Rubin, *Congressmen, Constituents, and Contributors*, (Boston: Martinus, Nijhoff), 1982; John W. Kingdon, *Congressmen's Voting Decisions*, (3rd ed., Ann Arbor: University of Michigan Press), 1997; William Welch, "Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports," (*Western Political Quarterly* 35:478-95), 1982.

accounting firms derailed his efforts in the 1990s to enact reforms of the accounting industry is a perfect example. The benefits were highly concentrated, the costs (seemingly) defuse, and the issue hopelessly complex.[6]

It is only the absence of systematic data on access that prevents political scientists from searching for relationships between access and policy-makers' behavior.[7] Academics are no less aware than participants that successful lobbyists create relationships and trust with those they seek to persuade.[8] This simple truth is repeated in countless accounts of influential Washingtonians who are confidants of presidents, trusted advisors to legislators, or relatives of either.[9]

[6 (DEV. 1-Tab 2)] There is, moreover, ample anecdotal evidence that donations help build relationships with policy-makers. Indeed, an industry of experts (often called "government affairs specialists") exists to advise donors on how to

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[6] Referring to the industry resistance to his attempts to institute accounting reforms and the power of their contributions, Levitt claims: "They waged a war against us, a total war . . . It used to be that if industries had a problem they would try to work it out with regulatory authorities. Now they bypass the regulators and go right to Congress. It's almost impossible to compete with the effect that money has on these congressmen." Jane Mayer, "The Accountants' War," *New Yorker*, April 22 & 29, 2002, p. 64.

[7] For an exception, see Richard L Hall and Frank W. Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees," (*American Political Science Review* 84:797-820), 1990.

[8] For instance, see John Mark Hanson, *Gaining Access: Congress and the Farm Lobby, 1919-1981* (Chicago: University of Chicago Press), 1991.

[9] Carl Hulse, "In Capitol, Last Names Link Some Leaders and Lobbyists," *New York Times*, August 4, 2002, p. A1.

use their funds to meet and interact with government officials.[10] The result, one contributor notes:

> There is no question that those who, like me, make large soft money donations receive special access to powerful office holders on the basis of the donations. I am close to a number of Senators, I see them on a regular basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into feeling otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.[11]

This access and these relationships are highly prized. Several insiders explain why:

> While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want.[12]

> If you have a particular problem in getting to see a Senator you can always go to the Senate Campaign Committee, and all we say is "we want five minutes with Senator X." Like I say, we are not buying votes, we just want five minutes to see that person.[13]

Such statements suggest both that the line between access and influence is often hazy and, just as often, is inconsequential. The pursuit of access is so fervid precisely because it so often leads to political influence. And that is the nub of the matter of the issue of corruption. While it is inevitable that [7 (DEV. 1-Tab 2)] influence and access to policy-makers will be unevenly distributed in a large popular democracy, it is not inevitable that opportunities to sway the policy-making process—the very heart of the representative process—should be so skewed toward those who fund election campaigns most generously.

Aside from the first-hand knowledge of insiders, there are the impressions of the great mass of American citizens. Many of them believe that moneyed interests—whether corporations or trade associations or unions or wealthy individuals—use their cozy relationships with policy-makers to exert special influence over government. A majority of Americans, for instance, agree with survey statements such as "government is pretty much run by a few big interests looking out for themselves."[14] Unlike the insiders, they, as "outsiders" form opinions on the basis of second-hand knowledge—and from inferences and appearances. From

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[10] For example, see the affidavit of Daniel H. Murray, October, 1998.

[11] Declaration of Peter L. Buttenwieser, July 19, 2002, p. 6-7.

[12] Declaration of Robert Rozen (April 17, 1997), p. 3.

[13] Center for Responsive Politics, *PACs on PACs: The View from Inside* (Washington: Center for Responsive Politics), 1988, p. 7.

[14] "Would you say government is run by a few big interests looking out for themselves or that it is run for the benefit of all of the people?" This item has been repeated every two years since 1964 (except 1986) by the National Election Studies. See National Election Studies, *Is the Government Run for the Benefit of All 1964-2000, at http://www.umich.edu/~nes/nesguide/toptable/ ab5a_2.htm.*

their reactions arise a profound skepticism about the fairness and responsiveness of the American political system, and inevitably a lack of confidence in it and support for it. On the crisis of confidence, the current scandal enveloping the financial markets provides a useful analogy. Both democracy and markets function well only with the trust and confidence of the public. In both cases the Congress has sought to restore public confidence, whether in corporate accounting and the valuation of securities, or the integrity of elections and policy-making. Indeed we would argue that confidence in elections and government is a precious resource worthy of even greater vigilance than the accuracy of corporate accounting.

The parallels extend beyond the matter of confidence. In both instances the Congress and the president have faced the same pivotal regulatory question: whether it is [8 (DEV. 1-Tab 2)] better to punish wrong-doers after the fact, or to make wrong-doing less likely in the first place. In both, too, they believed that the systems in question create incentives for, and certainly allow, behavior inimical to the interests and desires of ordinary citizens, and they have chosen to alter those incentives and behaviors. While legislators depended on advice about corporate finance and governance from experts like Alan Greenspan and Warren Buffett, they had little need for outsiders to explain how policy-makers give special service and grant special attention, possibly even deference, to donors of large sums of soft money. Their reaction in both cases was to alter or eliminate the structural features that threaten to undermine these systems. Given the importance of public confidence to democratic government, we regard such prophylaxis, where possible and reasonable, as highly desirable.

A2. The corruptive potential of soft money

Allegations of corruption are a frequent part of partisan give and take as each side accuses the other of bad faith. For example, during the Clinton administration the overnight stays in the Lincoln bedroom helped spark a series of accusations of influence peddling ranging from special dispensation for burial in Arlington Cemetery for a large donor to more serious charges that defense procurement and foreign policy had been affected by contributions from Loral Industries and Chinese officials. Each case involved the raising of soft money by the DNC that was, at least in part, used to pay for issue ads aiding Democratic candidates.[15] In all instances, moreover, the chorus of disapproval prominently featured the RNC or its officials, whose filings in this case argue that soft [9 (DEV. 1-Tab 2)] money poses no danger to parties and that its availability will not encourage the parties to corrupt the policy-making process.

We do not know, nor do we have all the evidence necessary to determine, whether the DNC was guilty of trading legislative or policy favors for donations in any of these instances. What is clear, however, is that all of these charges are credible on their face. There are reasonable grounds from the public record to be suspicious of the Democrats' conduct and to be suspicious of the Republicans in other instances.[16] We are in better position to evaluate the RNC's broader claim in this case that soft money does not corrupt. Critics of

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[15] See generally Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 5, 7, 18 & 32 (Majority Report).

[16] *Ibid.* See also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at Chapters 39, 10– 5, 22–25 (Minority Report).

BCRA essentially assert that it cannot, that a variety of structural features insure money routed through parties has no impact on policy-making. This argument is familiar from the record in *Colorado II* where it was rejected by the Court. In its various forms it rests on three broad assumptions: that parties are physically separate from policy-makers, that identities of donors and their interests are obscured when money is given to parties, and that party ideology dominates the interests of donors. We review them to show how they apply in the current case where soft money is at issue.

First is the notion that parties are in a sense physically separated from the elected and appointed officials who make governmental policy. The current chairmen of the DNC and RNC, for instance, are not government officials. That is not true, however, of the parties' Senate and House campaign committees, organizations that raised $212 million in soft money during the 1999-2000 election cycle and are headed by sitting [10 (DEV. 1-Tab 2)] legislators.[17] Simply put, no wall between the national parties and the national government exists.

The challenge to BCRA also involves the state parties, since it would prohibit them from using soft money for almost all activities related to federal elections.[18] State parties are not ordinarily run by federal officials. But that does not preclude very close financial relationships with federal parties and federal officials. A recent study by the Center for Public Integrity shows that state parties received 46 percent of their funds in 2000 from the soft money

[17] Federal Election Commission, *National Party Non-federal Activity, at http://www.fec.gov/press/051501partyfund/tables/nonfedsumm2000.html.*

[18] Levin Amendment funds are the exception.

accounts of federal committees.[19] Nor is it clear that the remaining 54 percent was raised without any help from Washington officials. Our examination of campaign finance data from Colorado and Missouri for two previous cases revealed that federal officials, from Cabinet secretaries to members of Congress, were the star attractions in major fundraising events sponsored by the parties in these states. One need only read the itinerary of Vice President Dick Cheney in 2000 to see this pattern repeated. Among the scores of events that the Vice President headlined were numerous fundraisers for gubernatorial candidates whose proceeds went to the state party. Again, we see no political distance between state party organizations and national policy-makers.

The involvement of federal parties and officials in the financial affairs of state parties highlights several realities that are relevant here. First, the overwhelming financial muscle of the national committees—the result of the roster of effective fundraisers holding federal office and donors' interest in federal matters—has rearranged [11 (DEV. 1-Tab 2)] the traditional relationship between state and federal parties with the former now operating frequently as virtual appendages of the latter. National organizations hire staff for state parties and are deeply involved in their operations. Even if they were not, we should point out that the state committees would retain an interest in federal elections within their boundaries. As former Senator Tim Wirth (D-CO) notes:

> When I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood the solicitees who made contributions to the party almost

[19] The Center for Public Integrity, *at http://www.publicintegrity.org/dtaweb/index.asp?L1=20&L2=9&L3=0&L4=0&L5=0.*

> always did so because they expected that the contributions would support my campaign in one way or another, and for the most part they expected that I would remember their contributions.[20]

Such ties may be natural, but their existence shows that routing money through state parties does nothing to insulate it from federal policy-makers. Even if an official like Wirth were not directly raising money for state parties, these organizations might very well attract many of the same donors eager to make additional contributions beyond the federal limits to help a federal candidate's campaign.

What is less natural is the sheer complexity of the web of financial interactions between these organizations. The welter of state and federal regulations make it advantageous for parties to act through national committees in some cases and state organizations in others.[21] The result is a confusing blizzard of transactions between various federal, state, and local organizations as parties' accountants search for the regulatory environment most conducive to their intended action. Some of these maneuvers—nearly instantaneous transfers of funds between multiple committees—are worthy of anything practiced by Enron. These transactions deepen the relationships [12 (DEV. 1-Tab 2)] between various party organizations and have the additional effect of adding a level of opaqueness to campaign financing. The difficulty of tracking money once it reaches state parties is evident is the tribulations reported by the Center for Public Integrity in its study of state parties: compiling the data took a year (due to

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[20] Declaration of former Senator Timothy E. Wirth, May 5, 1997.

[21] This is particularly true because of the need to allocate varying portions of hard and soft money for different activities. See David B. Magleby, ed., *Financing the 2000 Elections* (Washington: Brookings Institution), 2002, especially chapters 4 & 6.

the vastly different arrangements in the states) and revealed sizable discrepancies between amounts reported by federal and state committees.[22] The use of state party organizations to campaign on behalf of federal candidates thus undermines the public disclosure that is one of the widely applauded hallmarks of FECA.

Rejecting the claim of physical separation between parties and policy-makers, however, does little justice to the central roles that parties and their leaders play in campaign financing and policy-making. Indeed, we argued earlier that money given to parties is a more effective way of seeking influence than merely giving to individual members of Congress.[23] As a former director of the Democratic Senatorial Campaign Committee (DSCC) explained:

> If you want to get to know Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at our various events than it would be to write fifteen $1,000 checks to fifteen Senators, or Senators and candidates.[24]

We agree and note that this is precisely the point that parties make to donors. But this still ignores the identity of the officials that donors meet. Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative party machinery have special [13

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[22] The Center for Public Integrity, *at http://www. publicintegrity. org/dtaweb/index.asp?L1=20&L2=9&L3=10&L4=0&L5=0&State*

[23] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997.

[24] Declaration of Robert Hickmott (April 8, 1997), p. 10.

(DEV. 1-Tab 2)] influence on their colleagues.[25] Donations —especially six and seven figure soft money contributions —are usually made by the arrangement with or knowledge of these most influential members of the party. Little political sophistication is needed to see that these are the people that donors most wish to meet and persuade, and that the system obliges them. The nexus between donor and policy-maker is never closer than when a legislative campaign committee mediates the transaction.

Second, the argument persists that the interests of donors are essentially laundered from their contributions to parties. It presents this cleansing as a product of aggregating the hundreds of thousands of donations flowing to party committees. In the process, proponents claim, the identity of particular donors is lost. The Court specifically considered and rejected this claim in *Colorado II*, noting the systematic efforts of parties to link donations to specific campaigns via the "tally" system. In the 2000 elections tallying was superceded by an even more direct innovation, "joint fundraising committees" sponsored by Senate candidates and the party campaign committees, in which Senate candidates in effect raised soft money for use in their own races.[26] Contrary to claims, donating to parties does nothing to obscure the identity or interests of the donors. Indeed, as the Court notes,

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[25] The power of party leaders has waxed and waned considerably in the last hundred years, depending on institutional arrangements and the individuals involved. Recently, the attacks on the committee system and seniority following Watergate have left party leaders at their most powerful point in generations. See David W. Rohde, *Parties and Leaders in the Postreform House*, (Chicago: University of Chicago Press), 1991.

[26] See Common Cause, *Senate Joint Fundraisers Rake in $17.8 Million in Soft Money during 1999-2000, at http://commoncause. org/publications/march01/031601st.htm* (March 16, 2001). Also see Declaration of Peter L. Buttenwieser, July 19, 2002.

the parties function as "matchmakers" introducing [14 (DEV. 1-Tab 2)] donors and candidates and providing opportunities for them to interact.[27] We cite one example among many:

> On February 27, 1997, Senate Majority Leader Trent Lott sent out a fundraising letter on behalf of the National Republican Senatorial Committee promising contributors "plenty of opportunities to share [their] personal ideas and vision with some of our top Republican leaders, senators, and panel members." Failure to contribute, the letter apprised potential donors, meant that "you could lose a unique chance to be included in current legislative policy debates—debates that will affect your family and business for many years to come."[28]

These patterns surely hold for soft money as well as hard. In fact, given the vastly greater sums of the largest soft money donations—the average amount given by the top 800 soft money donors in 1999-2000 was $375,000—it is easy to understand why parties would be reluctant to lose track of these benefactors.[29] Contributors believe that their generosity is not forgotten, as a government relations specialist notes:

> In recent years, contribution of soft money—that is, money that can be donated outside the purview of the Federal Elections Campaign Act—has proven to provide excellent access to federal officials and to candidates for

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[27] "(T)he record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give donors the chance to get their points across to the candidates." 533 U.S. at 461 (2001).

[28] Affidavit of Alan Baron, October 14, 1998, p. 21.

[29] See Brennan Center, *Letter From Political Scientists, at http://www.brennancenter.org/programs/downloads/polisci_letter71001.pdf* (July 9, 2001).

> federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. As described above, soft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.[30]

Thus the possibility that the sheer amount of money raised by the parties has had the effect of making each individual contribution less important runs into the countervailing trend of larger and larger donations. The largest soft money gifts are many times the $20,000 limit on hard money donations to parties, a limit that the Court characterized as [15 (DEV. 1-Tab 2)] "not small" in observing that these moneys may be used to benefit specific candidates.[31] It is also worth noting that none of the research on the impact of donations cited above tests the effect of six- and seven-figure donations (fn. 5), instead examining the more pedestrian four- and five-figure sums that individuals and PACs may give directly to candidates under the FECA of 1974. It seems clear that the much greater size of the individual donations at issue here pose a proportionately larger risk of influencing their beneficiaries than do contributions of hard money.

The third part of the argument that parties are structurally immune from being corrupted or corrupting involves their ideology. In this view the goals, programs, and interests of a monolithic Democratic or Republican party, not the interests of the original donor, attach to the party's contributions and expenditures. So, even though the Democrats receive money from corporations and the Republicans from labor unions,

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[30] Affidavit of Daniel H. Murray, October, 1998, p. 6-7.

[31] 533 U.S. at 461 (2001).

each party's views take precedence over these donors' positions. But this argument gives far too much credit to parties' need for ideological consistency. When it comes to elections, parties know only one ideology, the capital "D" or "R" after the candidates' names. That practicality is reflected in funding decisions made by party committees that reflect virtually every political consideration save the candidates' views on the issues; mavericks are more than welcome if they can win.[32] Thus the parties run issue ads that eschew using the words "Democrat" or "Republican" in favor of reciting the virtues or (more likely) the shortcomings of the candidates.[33] Those same ads may even take positions [16 (DEV. 1-Tab 2)] contrary to the party's orthodoxy when it is judged helpful to the candidate, such as a spot produced by the Republican Party of Wisconsin which praised its Senate nominee for having "stood up to his own party."[34]

These tendencies are exemplified by the rise of legislative campaign committees (LCCs). Once moribund extensions of the party caucuses, these organizations have gained prominence commensurate with their receipts since the late 1970s. In Congress the LCCs are the two parties' Senate and House committees; many states have similar organizations or the party's caucus or its leaders act as LCCs by raising and distributing funds. As appendages of the caucuses and their

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[32] The most recent example is the RNC's ill-fated involvement in the 2002 gubernatorial primary in California on behalf of former Los Angeles mayor, Richard Riordan, who eventually lost to a candidate who complained that Riordan's views were much closer to a Democrat's than to a Republican's.

[33] Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2:207-212), 2002.

[34] *Ibid.*

leadership, the LCCs stand apart from the traditional party organizations in two salient ways. First, they have virtually no link to the parties' local organizations or local activists or to its platform. Instead, LCCs are created by groups of sitting legislators and responsible to them and only to them.

Second, the LCCs have a set of political interests quite separate from those of the broader party. They exist to win elections, to maximize the number of their partisans in a chamber and, above all, to win or maintain a legislative majority with all of the perks that come with it. As a result, their interest and concern for the rest of the party ticket is minimal, and they accept any party ideology at their own convenience. In at least one state, New York, they have intervened in local primaries in opposition to the endorsement of the local party. The leading observer of New York's LCCs writes:

> Traditional party leaders perceive these new units to be unconcerned with augmenting party membership, supporting the ticket, or aiding institutional support activities. The two camps do share a concern for winning state legislative elections and controlling a majority caucus, but that is about all. We may be hard pressed to distinguish LCCs in New York as little more than independent [17 (DEV. 1-Tab 2)] consulting firms working for the benefit of the legislative caucus and its leadership.[35]

In the end, there is no reason for its beneficiaries to view money routed through the parties as "party money" instead of associating it with its actual donors, whose identities are often well known to them.

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[35] Daniel Shea, *Transforming Democracy* (Albany: State University of New York Press), 1995, p. 112.

A3. Appearances

Buckley and its successors refer not only to corruption but also to its appearance. To this point the concern about appearances seems to be mainly rhetorical; we are not aware of any campaign finance cases decided solely on the basis of how a certain practice looks. One reason, of course, is that behavior that seems corrupting may in reality be benign. We would not argue that irrational beliefs should drive public policy. At the same time, however, the attention devoted to appearances reinforces the notion that the purpose of campaign finance regulation is to insure the public's faith in the electoral system. This seems to us to be clear both because of the obvious importance of trust for the functioning of democratic government and also because we doubt that some other justifications for combating corruption such as the desire for honest and efficient administration—rise to the level of constitutional imperative.

If public confidence is the goal, then the public's perceptions are at least as important as reality. We do not take this as an excuse to prohibit a vast sweep of campaign finance activities or to use polls to legislate. We do argue that in this specific case that there is ample reason that the public's suspicions about the corruptive impact of soft money are reasonable. As we have noted, citizens skeptical about the influence of large donations can find agreement from majorities in Congress, from donors, from [18 (DEV. 1-Tab 2)] lobbyists, from reporters and editorial writers, and from academics. Unfortunately, the sheer complexity of campaign finance regulation makes it difficult for citizens to take specific stands on specific categories of behavior created by campaign finance statutes. Nonetheless, the evidence is overwhelming that people view extra large contributions—the

sort that soft money makes possible—as contrary to honest and unbiased policy-making.

The evidence for this comes from a variety of polls. For example, in March 22-25, 2001, the Washington Post asked respondents (n=903) if they "think politicians do special favors for the people and groups who give them campaign contributions, or not?" Ninety-three percent agreed and the vast majority of this group believed that favors were granted often (as opposed to sometimes), that it is a big problem for government, and that this behavior is unethical, although they were split on whether this was illegal or not.[36] Under the circumstances, it is no surprise to discover that citizens overwhelmingly support restrictions on contributions to parties, occasionally in fairly specific terms:

> "As you may know, federal law limits the amount of money people can contribute to any presidential candidate's campaign, but people can give as much money as they want to any political party. Do you think the amount of money people can contribute to political parties should be limited, or unlimited?"— 63% limited, 33% unlimited.[37]
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> "Congress is now considering campaign finance reform legislation proposed by Senator John McCain that would ban unregulated contributions to political parties, even though some leading Republicans oppose this bill. Do

[36] PollingReport.com, *Influence, at http://www.pollingreport.com/politics.htm.*

[37] ABC News.com Poll, October 13-17, 1999. N=1,020. See *http://www.pollingreport.com/politics.htm.*

> you favor or oppose such legislation?"—56% favor, 26% oppose.[38]
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> "As you may know, 'soft money' is the amount of money that individuals, businesses and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the [19 (DEV. 1-Tab 2)] amount of soft money that any individual or group can contribute to national political parties?" —72% favor, 24% oppose.[39]
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> "Congress is now considering a major campaign finance reform bill that would sharply limit the ability of businesses, labor unions and individuals to make large donations to politicians and political parties. Based on what you have heard of this legislation, do you favor or oppose this legislation?" —62% favor, 25% oppose.[40]

Public opinion on these matters is informed by a variety of sources. To begin with, it reflects the well-publicized opinions of the various insiders and experts that we have noted. These opinions are reported in countless reports and editorials about campaign financing and its reform. Several genres of stories use campaign finance extensively in their analysis. Campaign coverage routinely features extensive discussion of the candidates' fundraising, reinforcing the lessons that campaigns cost enormous sums, that candidates are in a desperate search for funds, and that those who

[38] Bloomberg News Poll, July 31-Aug. 5, 2001. N=1,206. See *http://www.pollingreport.com/politics.htm.*

[39] CNN/*USA Today*/Gallup Poll, Oct. 6-9, 2000. N=1,052. See *http://www.pollingreport.com/politics.htm.*

[40] Bloomberg News Poll, March 12-17, 2002. N=1,203. See *http://www.nationaljournal.com.*

succeed in raising the most money are the likeliest to win election. It takes little effort to infer a link between campaign financing and policy-making from this set of facts. Indeed it is probably more difficult to hold out against the logic that candidates in need of money and donors in need of favors fail to satisfy one another.

The exchange of favors is very much a part of reporting on policy-making. Naturally, when reporters sense possible corruption they seek out credible sources for confirmation, so many of these stories—like those we referred to at the beginning of the previous subsection about former President Clinton—feature leading political figures and other experts alleging or denying that influence-peddling has occurred. Obviously, not everything that Congress or the executive branch does lends itself to the question of how donations may have played a role, but where possible this linkage is often invoked. So it [20 (DEV. 1-Tab 2)] is no surprise to read in the midst of the current financial scandal of Enron chairman Kenneth Lay's contributions to President Bush's campaigns, accounting firms' financial support of Republican lawmakers (see fn.6), or the lobbying of Democrats by their contributors from the technology sector. The headline in the *New York Times*, "Enron's Collapse: Enron Spread Contributions on Both Sides of the Aisle," or the *Los Angeles Times*, "Global Pressured Employees to Make Campaign Donations" are fairly typical of stories that appeared in virtually every newspaper in the country and all of its leading broadcast news shows.[41] We need not endorse the general allegations of influence peddling in these cases to point out that the fact

[41] Don Van Natta, Jr, *New York Times*, January 21, 2002, and Elizabeth Douglass and Karen Kaplan, *Los Angeles Times*, April 14, 2002. In fact, its supporters credited the Enron scandal as providing the impetus behind the House's passage of BCRA.

they are made creates the appearance that political contributions may have helped cause regulators and Congress to turn a blind eye to corporate malfeasance.[42]

Obviously, these suspicions color citizens' impressions of politicians and political parties, though neither have been held in particularly high regard throughout American history. We think it is likely that they also affect people's broader attitude toward government and their ability to influence it. Political scientists have attempted to measure trust in government and political efficacy for decades using a series of survey items appearing on the National Election Studies biennial survey like the one cited above (see fn.14).[43] Without exception all of these measures have worsened in the past decades [21 (DEV. 1-Tab 2)] as citizens have grown more suspicious about government and politicians and less confident of their own power. The explanation for these developments is complex, with both trust and efficacy related to presidential approval and satisfaction with the course of the country.[44] We think it likely that campaign financing —particularly the huge gifts of soft money given to the parties with the resulting skepticism it breeds—is among the

[42] Polls show that citizens perceive this link: 49% agreed that "political campaign finance system" was partially to blame for the corporate scandals, one of list of potential causes. Harris Survey, July 18-22, 2002. N=1,010. See *http://nationaljournal.com.*

[43] Additional questions of note include: "Do you think quite a few of the people running the government are crooked, not very many are, or do you think hardly any of them are crooked," "Public officials don't care what people like me think (agree or disagree)," "People like me don't have any say in what the government does (agree or disagree)." See National Election Studies, *at http://www.umich.edu/~nes/nesguide.*

[44] See Jack Citrin and Donald Philip Green, "Presidential Leadership and the Resurgence of Trust in Government," (*British Journal of Political Science* 16: 431-453), 1986.

developments undermining public opinion in these areas. That means, of course, that banning soft money will not restore public confidence to its highest levels. No single piece of legislation could. But by removing an obvious irritant, it is a step in the right direction. Results from several polls suggest as much:

> "I have more optimism about government since campaign finance reform passed Congress and will be implemented in November."—50% agree, 31% disagree.[45] "In general, if new campaign finance reform legislation were passed, do you think it would make our democratic form of government work much better than it does now, just a little better, about the same, just a little worse, or much worse than it does now?"—22% much better, 37% little better, 32% same.[46]

We cannot say that the effect will be as dramatic as these surveys indicate, but we have no doubt that the soft money ban in BCRA will help.

B. Building parties

B1. The role of political parties

Critics, including several of the plaintiffs in this case, argue that BCRA's ban on soft money will weaken political parties by depriving them of hundreds of millions of dollars. As political scientists, we take this charge very seriously. Parties' health is of grave concern to us and to many other scholars. All too often the ramifications for parties have been

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[45] Institute for Global Ethics/Pew, June 6-11, 2002. N=800. See *http://nationaljournal.com*.

[46] CNN/*USA Today*/Gallup, March 9-11, 2001. N=1,015. See *http://www.pollingreport.com/politics.htm*.

of little or no matter to many reformers. While most political scientists [22 (DEV. 1-Tab 2)] may not literally agree with E.E. Schattschneider that "parties created democracy, and . . . democracy is unthinkable save in terms of parties" they would recognize and appreciate the sentiment.[47] We certainly place ourselves among their number. But assessing BCRA's effect on parties is not as clear-cut as subtracting soft money from their total receipts. It requires, first of all, a more sophisticated understanding of what parties are and what they do.

Our appreciation for parties stems from many sources. It comes from the realization that no democracies exist elsewhere in the world without them, a pattern so well established that the U.S. government offers aid to build political parties in emerging democracies.[48] It grows from an understanding of how parties developed in this country, growing organically in the earliest Congresses as members organized themselves into "factions." These factions later—fairly quickly—spread to the public as citizens adopted allegiances to groups of politicians. Most of all, however, scholars have studied the ways in which parties affect government and citizens. This literature is enormous, but we would summarize it by pointing to a few of the main roles that parties play.

To begin, parties help organize government. The same need to form standing coalitions of policy-makers instead of creating new majorities from scratch with each issue that first impelled legislators into factions still exists. Indeed, many

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[47] E.E Schattschneider, *Party Government*, (New York: Reinhart), 1942, p. 1.

[48] Thomas Carrothers, *Aiding Democracy Abroad: The Learning Curve* (Washington: Carnegie Endowment for Peace), 1999.

specialists believe that attempts to stifle parties within government—with civil service protections or nonpartisan forms of governance—have hindered the ability of leaders to make and [23 (DEV. 1-Tab 2)] institute policy.[49] Republicans in Congress have lent tremendous support, occasionally at some political risk to themselves, to the initiatives of President Bush, just as Democrats earlier rallied behind President Clinton. They do so because they know and trust one another, because they likely share a basic philosophical perspective on government, because they appeal to the same supporters, and because they are to some extent judged by the public as a group. The last adds an important element of accountability to the system. Measuring the performance of the president by one's sense of how well the nation is doing may be relatively easy, but party labels allow voters to make the same connection for legislators, heightening their stake in their party's and the nation's progress.[50]

Parties also help organize elections in several ways. First, parties recruit and nominate candidates for office, help them get elected, and work to increase the turnout of the faithful. Historically, parties have provided labor to candidate campaigns and for turnout efforts, a reflection of an enduring campaign style before the advent of television. Thus, V.O. Key argued that one of the three key elements of parties is their organizational structure, chiefly the card-carrying or

[49] For example see James L. Sundquist, "The Crisis of Competence in Our National Government," (*Political Science Quarterly* 95:183-208), 1980.

[50] For two alternate views about party accountability see V.O Key (with Milton Cummings), *The Responsible Electorate: Rationality in Presidential Voting, 1936-1960*, (Boston: Harvard University Press), 1966; Morris P. Fiorina, *Retrospective Voting in American National Elections*, (New Haven: Yale University Press), 1981.

active members who do much of the nitty-gritty work in elections.[51] The second way in which parties help organize elections (and citizens' perceptions in between) is more symbolic in nature. Scholars argue that, while the vast majority of Americans never formally join a political party, they identify themselves with one or the other. These ties, though cognitive in nature, are remarkably [24 (DEV. 1-Tab 2)] enduring and powerful, coloring how people think about political figures and political issues.[52] For example, Republicans with little knowledge of a particular proposal of the Bush administration are apt to be sympathetic once they know its provenance, while Democrats are more likely to approach the idea skeptically. In part this agreement within parties reflects a general ideology shared by many (but not all) of its adherents, but it also illustrates the parties' central position in the political psychology of individuals and, in turn, their role in simplifying the political conflict individuals observe and the information they receive.[53]

[51] V.O Key, *Politics, Parties, and Pressure Groups*, (5th ed., New York: Ty Crowell Co), 1964.

[52] The huge literature on party identification begins with Angus Campbell, Philip E. Converse, Warren E. Miller and Donald Stokes, *The American Voter*, ((Midway Reprint) Chicago: University of Chicago Press), 1960.

[53] It has been a long-standing goal of many of our colleagues to create more "responsible" parties, organizations with, among other things, clearer and more comprehensive ideologies. See American Political Science Association Committee on Parties, *Toward a More Responsible Two-Party System*, (New York: Rinehart), 1950. Party identification's value as a simplifying device is stressed by a huge amount of work on public opinion over the last fifty years. For one influential example see Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper and Row), 1957.

What binds these different aspects of parties together is an overriding purpose to gain control of the government. Indeed, Schattschneider defined parties as an "organized attempt to get power."[54] In this respect parties are much different from interest groups whose goals are related to particular public policies. Parties are interested in policy, too, but often for pragmatic reasons; by some accounts parties strategically adopt positions to attract voters as they build a majority.[55] This emphasis on winning makes them both more malleable than groups and much broader in their appeal. Interest groups would happily elect candidates under their banner if they could, but their constituencies and their platforms are too narrow to compete successfully for office. Parties with their necessary "big tent" compete for the allegiances of multiple groups, demographic [25 (DEV. 1-Tab 2)] categories, and even various ideologues simultaneously, forcing accommodation and compromise on their constituent parts as they work toward the goal of winning the government. Parties thus are a part of government, but interest groups remain largely as outsiders, lobbying lawmakers and party leaders to attain their policy goals.

One consequence of the parties' intimate relationship to government has been a long tradition of regulation and jurisprudence stretching back into the 19th century. Part of this regulatory tradition has been aimed at controlling their power, including such diverse reforms as civil service, direct primaries, and a series of campaign finance laws of which

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[54] Quoted in Marty Cohen, David Karol, Hans Noel, and John Zaller, "Beating Reform: The Resurgence of Political Parties in Presidential Nominations, 1980-2000," (Presented at Annual Meeting of the American Political Science Association, 2001), p. 21.

[55] See Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper and Row), 1957.

BCRA is the latest example. But at the same time government has sought to limit parties, it has also acted to institutionalize them, especially the two major parties. State laws give automatic ballot lines to nominees of the Democrats and Republicans, and just occasionally to a few smaller parties, a major leg-up for parties in the struggle to contest elections. Governments sponsor party primaries, footing the bill and providing facilities for rank and file partisans to select their nominees. FECA also gives special consideration to parties in various ways, allowing them to coordinate spending with candidates and to collect larger hard money donations, and giving substantial public subsidies to the Democratic and Republican nominating conventions and presidential nominees. The result is that a leading scholar of American parties has compared them to "public utilities:"

> [T]he designation "public utility" . . . suggests an agency performing a service in which the public has a special interest sufficient to justify governmental regulatory control, along with the extension of legal privileges, but not government ownership or management of all of the agency's activities.[56]

[26 (DEV. 1-Tab 2)] B2. Building parties with soft money

There is no need to speculate about the immediate impact of a soft money ban on parties since there is a long record of soft money receipts and expenditures dating back a decade and longer.[57] The two national committees and the congressional campaign committees raised nearly $1.2 billion in

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[56] Leon D. Epstein, *Political Parties in the American Mold*, (Madison: University of Wisconsin Press), 1986, p. 157.

[57] Soft money was "invented" earlier in 1979 from an FEC ruling, but the parties were not required to report until after the 1990 election.

soft money from 1991 to 2000, including more than $700 million in the 1997-8 and 1999-2000 election cycles.[58] Of this sum, more than $500 million was transferred to state parties during this period, in addition to the $235 million of hard money that the national committees sent to the states.[59] We evaluate the impact of these resources on parties by referring back to the various roles they play in our political system.

To begin, there is no evidence that these financial resources have played any appreciable role in the historic level of party loyalty achieved within Congress over the last decade.[60] Leaders on all sides have gone to great pains to confirm their willingness to steer financial support to party colleagues regardless of their voting records, and there is no reason to doubt them. There is anecdotal evidence of some financial strong-arming in the states as party leaders in legislatures with highly centralized systems like New York's or California's have reputedly used their control of electoral resources to reward and punish legislators according to their support of the leadership. In Congress, however, this has not been the case. This conclusion does not contradict our earlier argument about the corruptive potential of soft money, for the behaviors in each situation are [27 (DEV. 1-Tab 2)] fundamentally different. The use of soft money to enforce party discipline involves leaders using their control of campaign resources as leverage on the entire caucus on a broad swath

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[58] See fn.1. These figures do not include the $308 million raised in the 2001-2 cycle as of June 30, 2002 (*http://www.fec.gov/press/20020919partyfund/20020919partyfund.html*). Nor do these figures include soft money raised directly by state parties (see fn.19).

[59] Federal Election Committee, *Campaign Finance Reports and Data, at http://www.fec.gov/finance_reports.html.*

[60] See fn.25.

of roll-call votes important to the leaders. Our argument about corruption, on the other hand, involves the donors' use of parties as conduits to route soft money to legislators in return for a wide variety of actions on a relatively narrow set of issues.

At first glance, the effect of soft money on the numbers of Americans voting and on electoral competition seems rather unimpressive. Voter turnout, already low, continued its slow decline in the 1990s with the exception of 2000 when a slightly greater percentage of Americans cast ballots than had four years earlier. Even so, voter turnout at the end of the 1990s was actually slightly lower than it had been at the start.[61] Similarly, electoral competition returned to historically low levels as soft money receipts rose. This was particularly true for the House of Representatives, the set of elections in which the lack of competition has been of greatest concern and which, because of their large numbers and equally-sized districts, offer analytical advantages. There the number of close contests has declined markedly since 1996 as spending has skyrocketed.[62] Granted, parties cannot be held completely responsible for these disappointments, but one of the main arguments for strengthening

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[61] See *Statistical Abstract of the United States, 2002* edition. Estimated turnout in presidential elections was 55.1 percent of the voting age population in 1992, 49.1 percent in 1996, and 51.2 percent in 2000.

[62] Competitiveness has been measured in a variety of ways both before elections when forecasters attempt to predict which races will be close and after when returns are available. One familiar measure is to count the number of "marginal" districts, races where the incumbent won less than 60 percent of the vote. The number of marginals declined since the use of soft money in House elections from 115 in 1992, 119 in 1994 and 120 in 1996 to 91 in 1998 and 76 in 2000. See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001-2*, (Washington: American Enterprise Institute), 2002.

parties is for their ability to stimulate greater turnout and competition.

[28 (DEV. 1-Tab 2)] Our concern here, however, has less to do with byproducts of stronger parties than with the actual strength of these organizations. The $1.2 billion raised and spent over the last decade suggests they today's parties should be more formidable than those in the recent past. Yet, there is much reason to doubt that assumption. To begin with, survey data show no real increase in the strength of partisan attachments. The National Election Studies asks respondents a series of questions about their identification with parties, from these building a seven-point scale that has been the academic measure of partisanship for 50 years. After a decade of lavish spending, however, the percentage of strong partisans, those with the greatest attachment to their party from whose ranks the most active citizens come, has shown virtually no advance.[63] In 1992, 29 percent of respondents identified themselves as strong Democrats or Republicans, compared to 31 percent in 2000.[64] These figures are near the historic low registered over the course of 50-year series of NES surveys, and this lack of enthusiasm for parties is echoed in responses to other questions about them that the NES asks.[65] The inference is obvious: whatever party-building the $1.2 billion of soft money has funded over the

[63] See Angus Campbell, Philip E. Converse, Warren E. Miller and Donald Stokes, *The American Voter*, ((Midway Reprint) Chicago: University of Chicago Press), 1960.

[64] National Election Studies, *at http://www.umich.edu/~nes/nesguide/taptable/tab2a_1.htm*

[65] See National Election Studies, *at http://www.umichedu/~nes/nesguide/taptable/tab2b_1.htm* and *http://www.umich.edu/~nes/nesguide/taptable/tab2b_2.htm*

past decade, it has done little or nothing to attract citizens to the party banners.[66]

The most obvious explanation for these results is that parties have been remarkably restrained about proclaiming their virtues and only somewhat less shy about [29 (DEV. 1-Tab 2)] skewering their opponents. The chief way in which parties speak directly to citizens is through television advertisements.[67] Media tracking data from the top 75 media markets show that parties were extremely active advertisers in both 1998 and 2000, sponsoring ads that appeared over 310,000 times.[68] But the parties' commercials in these years were distinguished most notably for their failure to mention either party by name. Viewers with sharp eyes might have spotted a disclaimer like "Paid for by the Democratic

[66] It is noteworthy that this time period has been regarded as one in which experts, influenced by parties' success raising funds, have pronounced them resurgent. One of the few scholars to question this conclusion has asked how it is possible for parties to prosper without followers. See John J. Coleman, "Resurgent or Just Busy? Party Organizations in Contemporary America," in *The State of the Parties: The Changing Role of Parties in American Parties,* (2nd edition, John C. Green and Daniel M. Shea eds., Lanham, MD: Rowman and Littlefield), 1996.

[67] For example, see Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections, (Berkeley, CA: Institute of Governmental Studies), 2001, also available at *http://www.cfinst.org/parties/papers/laraja_softmoney.pdf*, showing television advertising was (after expenses) the parties' largest expenditure of soft money. It is a trait that parties share with candidates who have long been noted for their reliance on paid television. Parties, however, cannot count on the same level of free media coverage of their activities that candidates enjoy.

[68] See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

National Committee" near the end of an ad, but the words "Democrat" or "Republican" appear nowhere else in the vast majority of party ads run during 1998 (85 percent did not mention party) or 2000 (93 percent).[69]

While parties are curiously absent from their own commercials, candidates are nearly ubiquitous; their names were mentioned in 95 percent of ads aired by parties in 1998 and 99 percent in 2000.[70] The clear implication is that parties dedicated their advertising dollars to promoting the fortunes of their candidates, not themselves. Muting their partisanship served the needs of candidates, who in their quest for swing voters, were eager to attract support from independents and crossovers. Thus parties mimicked candidates by rarely invoking partisan labels, instead focusing on the characteristics of the candidates. The candidates that parties focused on, moreover, were usually not their [30 (DEV. 1-Tab 2)] own but their opponents. Party ads mentioned the opposing candidate in 51 percent of spots aired, their own candidate in 17 percent, and both candidates in 32 percent.[71] It is no surprise,

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69 Just 15 percent of party ads in 1998 and 7 percent in 2000 mentioned either political party. See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

70 Coders were asked separate questions about both candidates and coded references in the text and/or visuals. For results, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2:207-212), 2002. For information about the coding, see *http://www.polisci.wisc.edu/tvadvertising/Coding%20the%20Ads.htm*.

71 Calculated by the authors. The 1998 data set, the same one used to create *Buying Time: Television Advertising in the 1998 Congressional Elections*, is attached as an exhibit to this report. The calculation for 2000 makes use of a version of the 2000 data set from May 14, 2002. A later

then, to discover, that most of the spots parties aired were regarded as "attack" advertising by the coders who reviewed these ads.[72] Candidates displayed the opposite pattern, using their commercials to proclaim their virtues. The reason candidates shy away from attack advertising is the fear that it will make them appear mean. The fact that parties are left to do the dirty work of campaigning cannot make them more appealing to the public.

The data on parties' television advertising also illustrate another aspect of party-building over the last few elections: its remarkably narrow focus. The top 75 media markets serve at least half of households in more than 335 congressional districts. Yet in both 1998 and 2000, more than half of the advertisements that parties sponsored in these markets appeared in just a dozen races.[73] Clearly the parties were concentrating their resources on the contests where they judged their funds might be decisive, but in consequence the vast majority of Americans heard nothing from them about their candidates. There is clearly a tension between building

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version of these data is provided with the Expert Report filed by Professor Kenneth Goldstein.

72 The tone of a commercial was coded according to the following question: In your judgment, is the primary purpose of the ad to **promote** a specific candidate ("In his distinguished career, Senator Jones has brought millions of dollars home. We need Senator Jones."), to **attack** a candidate ("In his long years in Washington, Senator Jones has raised your taxes over and over. We can't afford 6 more years of Jones."), or to **contrast** the candidates ("While Senator Jones has been raising your taxes, Representative Smith has been cutting them.")? See Krasno and Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, (New York: Brennan Center, 2000).

73 See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

parties everywhere—if their ads could somehow be construed to affect partisanship—and trying to win specific elections. We would not advocate that parties do only the first without regard to the second, but [31 (DEV. 1-Tab 2)] adopting the opposite strategy inevitably limits the amount of party building in which they engage.

Finally, there is the matter of formal party organizations. Here we are confronted with a dizzying array of organizations from the traditional state and local committees that have been such a large part of the scholarship on American democracy, to the newly-prominent LCCs and a variety of caucuses and offshoots affiliated with the parties or their leaders.[74] We focus on the former, the more locally based organizations that are closer to ordinary voters and historically have been the great source of grassroots political activity during campaigns. Indeed, even those political scientists who oppose restrictions on soft money argue mainly that soft money is worth saving for its effect on traditional party organizations.[75] We believe that close examination of the evidence suggests that soft money has had little lasting or positive impact on state and local organizations.

Our opinion is informed by two case studies we undertook for previous litigation, *Colorado II* and *Missouri Republican Party v. Lamb*.[76] In both instances, the plaintiffs argued that

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[74] Among the last we would include organizations like the Democratic Leadership Council or Log Cabin Republicans.

[75] E.g. Statement by Raymond La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?*, at *http://www.cfinst.org/parties/mf_responses.html*.

[76] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997; Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican Party v. Lamb*, 2000.

various restrictions on political parties would cripple their ability to act during and between campaigns. The facts, however, did not support these claims. The executive director of the Colorado Republican Party, for instance, at the time of this litigation was a resident of the Washington, D.C. area hired by the RNC. The Colorado party received most of its funds from the NRSC, and other money was raised for it, with little involvement by state officials, at events featuring visiting members of Congress and [32 (DEV. 1-Tab 2)] the first Bush administration. Despite this infusion of resources, the party was not able to organize a phone bank for volunteers or print out mailing labels for its own members.[77]

The situation in Missouri, several years later, was nearly identical. Again, the apparatus of the state party proved unwilling or unable to undertake basic tasks such as phone banking or leafleting on its own. In addition, without any state limits on the size of the contributions it received, Missouri's Republican party relied heavily on large donors: 80 percent of its receipts came from just 36 donors (excluding the national parties) from a total list of contributors numbering approximately 1,000.[78] Like its counterpart in Colorado, the Missouri party's direct involvement in campaigns was limited largely to writing checks. Both committees paid outside vendors to run their phone banks and send their mailings; in addition they sent much larger checks to consultants for advertising. A highly specialized campaign

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[77] Frank J. Sorauf and Jonathan S. Krasno, "Political Party Committees and Coordinated Spending," prepared for the Federal Election Commission in *Colorado II*, 1997, p. 35-6.

[78] Frank J. Sorauf and Jonathan S. Krasno, Statement prepared for *Missouri Republican*, 2000.

industry allows parties to purchase campaign services, leaving them to raise money and choose from a menu of options. With the variety of paid alternatives available, the parties have fewer incentives to seek out citizen involvement in campaigns beyond their cash. The mass-based party organizations so highly esteemed by scholars seem to have been largely abandoned for a newer version relying on commercial services.

Other scholars echo these concerns. For example, in a recent "cyber-forum" on parties for a group of experts invited to comment on BCRA, a number of participants questioned whether soft money has had any lasting effect on parties. One explained:

> [33 (DEV. 1-Tab 2)] Soft money does not appear actually to build party infrastructure . . . Soft money funds the "coordinated campaign," but leaves very little behind in terms of permanent assets for the party once the campaign is over.[79]

Another participant was blunter:

> I would argue that soft money doesn't really make the parties strong; it makes the people who bring soft money to the party strong.[80]

Impressions such as these reflect the extent to which parties have transformed themselves into organizations serving the immediate electoral needs of specific candidates. That was

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[79] Statement by Professor John C. Green, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

[80] Statement by Professor Robin Kolodny, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

always the purely electoral life of the LCCs, but state and local parties—though also preoccupied by elections—had an enduring organization of their own, and their strength was always measured by their ability to recruit candidates, mobilize activists, organize party legislators, and debate party issues—as well as to manage the assorted tasks of delivering the party vote. All of that meant that they had a complex set of roles and tasks far beyond raising money and serving as conduits for national party funds.

Against this critique of the development of state parties in recent decades are two objections. The first is that a technological revolution has overtaken and transformed the old ways of campaigning. Thus, parties have had to adapt or risk irrelevance; a number of our colleagues take the emergence of these "service parties" as signs of parties' inherent vitality and significance.[81] There is no doubting that technological changes have occurred, but they have not rendered obsolete the old-fashioned personal campaigning by candidates and volunteers. Our enthusiasm for volunteerism rather than subcontracted campaigns is not nostalgic; it is pragmatic. Research shows that face-to-face [34 (DEV. 1-Tab 2)] campaigning is vastly more effective in stimulating turnout than the phone banks and direct mail that have replaced it.[82] Even more fundamental, local activists bring energy and talent to the political sphere. They help educate citizens about politics and deepen their involvement in their communities. For parties, when the election is over and TV ads no longer aired, when the phone banks and direct mail vendors are abandoned, activists remain a durable asset that

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[81] For example, see David Manafee-Libey, *The Triumph of Campaign-Centered Politics.* (New York: Chatham House Publishers), 1999.

[82] See p. 45 below.

the parties can continue to count on. No one can help but be impressed by the vast amounts of money flowing through parties, but the money has passed through them without leaving behind any lasting benefit.

Other political scientists accept the traditional model of state and local parties but argue that soft money has done them some good.[83] None of these scholars claim that anything more than a small fraction of each dollar raised has been spent to the benefit of state parties. By one estimate the soft money that state parties devoted to "grassroots party building" from 1992 to 1998 amounted to just under $20 million out of their total soft money expenditures of $520 million during this period.[84] Adding some of the other expenditures to the party building category—a portion of overhead costs, for example—may bring the totals higher, but they remain a small portion of the soft money they spent. Indeed, these data point to one major reason for the organizational weakness of the state parties: a chronic lack of investment.

[35 (DEV. 1-Tab 2)] B3. Candidates v. parties

That so little building of political parties, at least in a useful and lasting way, has occurred over the last decade does not mean that this trend will continue. Supporters of soft money place great stock in the possibility that the continued availability of vast sums of money will eventually work to the greater benefit of parties, even as they argue that some portion of these moneys are already spent in positive

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83 See particularly, comments of Ray La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

84 Ray La Raja and Karen Pogoda, , "Soft Money Spending by State Parties: Where does it really go?," (Berkeley: Institute of Governmental Studies and Citizens Research Foundation Working Paper), 2000, p. 17.

ways.[85] We are far less sanguine about the future, for we believe that party strategies over the last decade, far from being haphazard, are deliberate and well-considered responses to their need and desire to support candidates at all costs. As we noted above, that overwhelming concentration on the promotion of candidates conflicts with the building of parties.

One of the parties' greatest strengths is their breadth: parties encompass diverse constituencies. Democrats and Republicans contest elections in all corners in the country —sometimes with little success for long periods of time— and voters everywhere overwhelmingly identify with one of them. Thus, there is some sort of Democratic and Republican party in even the most inhospitable territory. With every presidential election we hear the plaintive appeals of Democrats and Republicans in various locales pleading for their national party to campaign more heavily in their areas. Victory, though seemingly impossible, is often argued to be within reach; moreover, local partisans hope to provide encouragement and resources to the other party candidates on the ballot. Indeed, according to press reports, California Republicans succeeded in convincing the RNC and Bush campaign to divert resources from several states including Florida in the [36 (DEV. 1-Tab 2)] final days of the 2000 campaign to avoid disheartening local partisans by seeming to abandon the state to the Democrats.

From the standpoint of Republicans in California, that decision surely made sense, but for the Bush campaign it might have been disastrous had the race in Florida turned out

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85 For example, see comments of Ray La Raja, *CFI "Cyber-Forum": How would McCain-Feingold affect the parties?, at http://www.cfinst.org/parties/mf_responses.html.*

differently. Of course, other Republicans would also regret any allocation of funds that costs them the presidency. This shared interest in the White House is much less relevant for specific candidates for the House or Senate. Indeed, the competition for party resources among various congressional candidates is fierce, beginning with mandatory pilgrimages to Washington to seek the blessings of legislative campaign committees. Party operatives attempt to weed out the likely candidates from the hopeless so that the parties may invest wisely in those races where its help is most meaningful, a process often called "targeting."[86] But even if we assume that parties (or anyone) possess the prescience to predict which races might be close many months in advance, it is clear that the more parties are able to direct their funds to the small set of races thought to be teetering in either direction, the fewer Americans are affected by their efforts. As we noted earlier, the logic of targeting conflicts with the process of building stronger parties everywhere.

The more fundamental question, however, is why so little of the soft money spent within a state is used to help its party organizations in any meaningful and lasting way. Given their acknowledged goal of targeting a small number of candidates, the answer [37 (DEV. 1-Tab 2)] must involve the perceived needs of those candidates as Election Day approaches. Candidates, unlike parties, have no certain political life

[86] Parties could always target with their hard money, but their ability to shift resources to favorite candidates was constrained by limits on their direct contributions and coordinated expenditures. One result of these limits is that the NRSC for a time routinely spent the maximum allowed for coordinated expenditures on almost all of its candidates. This pattern contributed to the decision by one candidate in 1988 to sue the committee for additional money it had decided not to use on his race. See Jeff Holyfield, "Riegle Expected To Win Big Over Dunn," Associated Press Political Service, November 8, 1988.

following an election loss. All of the resources they can muster are expended in the attempt to win office. Parties that primarily serve candidates follow the same rule. The problem is that developing a grassroots organization—identifying leaders, recruiting volunteers, providing training and creating opportunities to interact and work together—might take years of effort. Candidates would happily accept the help of legions of party workers; they just have no interest in diverting time and money to help build that network, especially if those efforts fully ripen in later elections.[87]

Candidates have no reason to oppose stronger, more traditional party organizations, but they have even less reason to inconvenience themselves by helping build them. Incumbent public officials may have done much of the hard work of raising money for parties before a campaign, and even when they are not directly involved, specific candidates are often invoked in fundraising appeals by party officials. Furthermore, parties and party organizations are for the vast majority of donors of secondary importance to individual candidates. As a consequence, parties present themselves as allies of candidates, a natural inclination for party leaders who are eager supporters of their tickets. Even if a state or local party official hesitated to help an individual candidate, the financial power wielded by the LCCs in Washington, organizations explicitly controlled by federal officeholders, keeps state and local committees beholden to their wishes. The substantial financial transfers to states and the [38 (DEV. 1-Tab 2)] dependence of many state organizations on the federal committees leaves many of them as virtual agents of these committees.

[87] It is worth noting that these volunteer efforts offer little or no profit for the campaign industry that provides services to parties and candidates.

The very notion that candidates and parties have separate interests may be surprising to those accustomed to see parties and candidates bound together by a common purpose. We would agree up to a point. We agree that control of government redounds to the benefit of all party members; few would advocate, for example, wasteful or foolhardy spending. Nonetheless, with respect to campaigns parties' interests are clearly distinct from those of candidates, even presidential candidates trying to win a nationwide election. Because parties embrace innumerable candidates running for innumerable offices, there is, in effect, a need to be everywhere at once. Because parties are enduring institutions (or hope to be), they stand to benefit from long-term investments that candidates cannot undertake. Because parties seek loyal adherents while candidates welcome voters of all stripes, invoking partisan labels serves parties better than candidates.

What if we are wrong? What if parties were to choose sometime in the future to devote greater dollars to their own needs by trying to attract supporters, polish their public images, and rebuild local organizations? We would applaud these developments, but we doubt that banning soft money would hinder them. Even more noteworthy than the parties' soft money receipts during the 1990s was the hard money fundraising by the national committees alone: $445 million (1991-2), $384 million (1993-4), $638 million (1995-6), $445 million (1997-8) and $705 million (1999-2000).[88] The total of $2.6 billion over these ten years is clearly sufficient to maintain the current, paltry investment [39 (DEV. 1-Tab 2)] in party building (fn.84) or even a much more expansive program. The money is available; parties have lacked the incentive or the control to spend it on themselves.

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[88] Federal Election Committee, *Campaign Finance Reports and Data, at http://www.fec.gov/finance_reports.html.*

Nor would a loss of soft money shrink parties to the point of being overshadowed by interest groups. The FEC reports that all PACs combined raised $2.3 billion from 1991 to 2000 and contributed about $1.1 billion to candidates.[89] Parties more than kept pace with hard money alone, helped by larger contribution limits and their roster of elected officials.[90] But this comparison overlooks the fact that much of the money flowing to parties is interested money, including contributions from PACs. More fundamentally, reducing the comparison between parties and interest groups solely to financial matters misses the crucial aspect of parties' nature, as well as the main advantages that they possess over interest groups. These advantages begin with the tens of millions of Americans who identify with the Democrats or Republicans, and the thousands of officeholders whose names are listed on ballots with their party affiliations. Interest groups—especially once the full array of organizations like 501s and 527s are included—may have more money than parties, but no combination of groups has constituencies outside or inside government that compare with the parties'.

Finally, no one should underestimate the parties' ingenuity and capacity for adaptation, skills they have successfully exercised for more than a century in meeting every change in American electoral politics. Certainly, BCRA's implementation will decrease the amount of money available to state and local party organizations in the short run, but that loss will stimulate them to broaden their base of contributors and raise more hard money. Belt tightening will also force them to use their money more efficiently and [40 (DEV. 1-Tab 2)]

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[89] *Ibid.*

[90] Individuals may give up to $20,000 yearly to parties, $5,000 to PACs under FECA. The BCRA raises the annual limit on contributions to national parties to $25,000.

effectively; it may even lead to an era in which campaign budgets reflect some rational definition of need. Many parties will also substitute less expensive volunteer efforts for some of the high-priced services currently purchased with soft money. Rebuilding their cadres of activists and returning to a more mass-based form of campaigning would also help increase voter turnout and improve candidate recruitment. But most of all, these steps would reestablish the parties' ties to local electorates and restore one historic line of responsibility for the decisions they make. It would free the state parties from the "dole" and its accompanying interventions and control by national party committees. One may think of the soft money ban in BCRA as a form of "tough love," an affectionate rebuke likely to help state and local parties more than it hurts them.

C. Voter turnout

C1. Turnout in the U.S.

Voting is, by far, the most common way that people participate in politics.[91] It owes its popularity to the relative convenience of casting a ballot—a task usually requiring an hour or so every two to four years—and to the importance that people attach to it. Even nonvoters overwhelmingly agree that "voting in elections is extremely important in making someone a true American."[92] Scholars place similar

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[91] The National Election Studies asks respondents about a variety of activities: registration, voting, along with whether they tried to influence others, attended a political meeting, worked for a party or candidate, wore a button or put a bumper sticker on their car, and gave money to a campaign.

[92] Survey item from the 1991 National Election Studies Pilot Study. The full question reads: "Is voting in elections extremely important, very

important on voting and often characterize it as a chief means of exercising popular control of government. It is no exaggeration to claim that voting is an essential responsibility of democratic citizenship.

[41 (DEV. 1-Tab 2)] In the comparative perspective, the proportion of eligible citizens who cast ballots in the U.S. lags far behind the turnout rate in most other industrial democracies. Most of that gap can be ascribed to a variety of legal differences—from registration requirements to the scheduling of elections—that make voting in the U.S. more difficult than elsewhere.[93] As a result, a better comparison may be historical. Even here, however, today's turnout rates are well below those in past elections. In 1960, for example, 62.8 percent of eligible citizens voted in one of the closest elections in U.S history; in 2000, just 51.2 percent cast ballots in an even closer contest.[94] This decline is part of a steady trend downward over the last four decades.[95]

The long-term decline in turnout has caused much consternation among policy-makers and scholars. For some

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(important), somewhat (important), or not at all (important) in making someone a true American?"

[93] Among the legal arrangements increasing turnout rates in several other countries is mandatory voting whereby failure to cast a ballot is punishable by a fine. See David P. Glass, Peverill Squire, and Raymond E. Wolfinger, "Voter Turnout: An International Comparison," (*Public Opinion* 6: 49-55), 1984.

[94] Turnout rates in state and local elections are generally much lower when they do not coincide with the presidential ballot.

[95] This decline is especially vexing because it has occurred as blacks, always legally eligible to vote, were allowed to exercise the franchise in the South, and registration requirements were being eased throughout the nation. The 26th amendment giving 18 to 20 year-olds the right to vote, on the other hand, depressed turnout rates by adding millions of eligible voters from the age group with the lowest level of turnout.

of these observers, the low levels of voter turnout are an indication of a growing emergency in American politics in which citizens have grown disaffected or bored by their leaders and their government.[96] Others view these claims as overwrought and point to survey results showing that Americans typically report greater faith in their government and interest in campaigns than citizens in other countries. Regardless of how they interpret the decline in voting, there is widespread agreement that turnout rates merit close attention and that higher levels would be desirable. Parties, given their traditional emphasis on mobilizing their voters, could potentially play an [42 (DEV. 1-Tab 2)] important part in halting and reversing the shrinking percentage of Americans who vote.[97]

As a result, one must be concerned about the argument in the debates over BCRA that the ban on soft money would hinder parties' efforts to mobilize voters and thus depress turnout. The Congress attempted to soften the financial blow to parties' mobilization programs by passing the "Levin Amendment" allowing state and local parties to use limited amounts of soft money to conduct generic voter registration and turnout efforts. This concession will surely help make more funds available in these areas. The more basic issue, however, is whether the broader ban on soft money will hamper parties' ability to boost turnout. The answer reflects our argument about how parties have come to function primarily as purchasers of campaign services in their attempt to aid individual candidates. The data show that parties

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[96] For example, Walter Dean Burnham, *The Current Crisis in American Politics* (New York: Oxford University Press), 1983.

[97] Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America*, (New York: MacMillan Press), 1993.

devote relatively meager amounts of soft money to promoting turnout, and further analysis reveals that they have spent most of this money in ways that minimizes even this limited impact.

We begin by citing a scholar on parties' use of soft money, Professor Ray La Raja, also an expert for the plaintiffs in this case. Working with a database of more than 500,000 separate expenditure entries reported to the FEC by federal, state, and local party committees in 1999-2000, Professor La Raja and his coauthor divided these items into six categories including the parties' spending on "mobilization."[98] Spending on mobilization by federal, state, and local party committees summed to $49.6 million in 2000. From [43 (DEV. 1-Tab 2)] 1992 to 1998, state party spending on mobilization slowly grew from $8.6 million to $22.6 million, reaching $41.8 million in 2000.[99]

The question is whether $49.6 million is a lot or a little money. We are inclined toward the latter. In 2000, the parties' spending to promote turnout accounted for 10.4 percent of their $478 million in soft money expenditures.[100]

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[98] Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections, (Berkeley, CA: Institute of Governmental Studies and Citizens' Research Foundation Policy Brief), 2001, p. 3. Mobilization is defined as "costs of registering and contacting voters through direct mail, telephone banks, canvassing, and voter files." Note that this characterization includes activity that might be more geared to persuading voters than to reminding them to vote.

[99] *Ibid.*, p. 3 & 6.

[100] *Ibid.* Direct comparisons are available only for state parties in previous years. State parties' spending on mobilization ranged from 9 to 16 percent of their soft money expenditures during this period. In 2000, state parties devoted the most money to mobilization, $41.8 of the $49.6 million spent by parties at all levels.

Granted, it is not realistic to expect the parties could spend all of their soft money on mobilization. Overhead and fund-raising are costly, accounting for 47 percent of their soft money spending. Traditional grassroots activities like yard signs, bumper stickers, and rallies added up to another 2.6 percent of their expenditures. The remaining amount was spent on "media" (33.4 percent) and "other/unidentified" (6.6 percent).[101] Thus, nearly half of all soft money went toward administrative or fundraising expenses, leaving parties with about fifty cents of every soft money dollar to spend on a variety of purposes including mobilization.

Moreover, turning out voters came in a very distant second to spending on media advertising. From our perspective, this allocation and the fact that the parties' media focused so heavily on specific candidates (p. 17) are indicative of a broader trend toward service parties. Just as we argue above that party building is of little importance to candidates in the midst of their campaigns, we conclude here that mobilizing voters was a far lower priority than airing television ads and competing for undecided voters. Whether spending three times more on media than on turnout efforts made good political sense for [44 (DEV. 1-Tab 2)] parties or for candidates they support is an open question. The parties obviously thought so, a decision that severely limited the amount available to spend on mobilizing voters.

C2. Mobilization expenditures in the 2000 election

Before dismissing the $49.6 million spent by the parties in 2000 on voter mobilization, it is important to consider the impact of these funds. We attempted to do so by replicating

[101] *Ibid.* Media refers to cost of television, radio and print ads, including production costs. Other/unidentified are items whose purpose could not be determined including consultants.

Professor La Raja's coding of mobilization expenditures in the 2000 elections.[102] Using the same FEC data, we identified 28,157 entries totaling $40.4 million in soft money as relating to voter mobilization by searching the parties' descriptions of the purpose of their expenditure for a series of key words or phrases like "absentee" or "election day."[103] We are not able to replicate exactly La Raja's painstaking coding, but we are satisfied that we capture all of the main components of spending that he describes as mobilization and that the resulting data set is reasonably close to his specification.[104] Given the analysis we undertake, they are sufficient for our purposes.

Our inquiry focused on two related questions. The first is the actual activities on which party mobilization funds were spent, such as mail, phone banks, or canvassing. The second

[102] These data were compiled by Krasno with the help of Robert Biersack of the FEC, and further coded by Krasno. The data set is included in the CD provided as part of the Appendix.

[103] The FEC asks filers to describe the purpose of their expenditure in their own words. The result is thousands of different descriptions, largely due to variations in describing the same activity. Following La Raja, we coded descriptions including the following key words or phrases as mobilization expenses, regardless of their timing: "GOTV" (acronym for "get-out-the-vote"), "voter," "absentee," and "election day." In addition, we also categorized entries containing the words "phone," "mail," "postage," "slate," "printing," "canvass," or "list" as related to turnout if they were made in the last two weeks of the campaign. The FEC file includes allocations of federal and nonfederal, or soft, money. In this discussion, we focus on only the latter.

[104] One possible explanation for the disparity is our decision to limit certain mobilization expenditures to those occurring in the last two weeks of the campaign. La Raja is not clear about how to treat these items, but by focusing on late phone calls, direct mail and other outreach programs, we felt certain that we included only those activities whose impact on mobilization are most direct.

is whether these expenditures were for services purchased from [45 (DEV. 1-Tab 2)] subcontractors or whether they pay for activities actions undertaken by the parties themselves. Both questions are inspired by a set of papers by Professors Alan Gerber and Donald Green measuring the impact of different activities on citizen turnout rates. Their studies used an experimental approach in which randomly assigned groups of respondents were exposed to reminders to vote delivered via mail, telephone, or in person. Their conclusions are an emphatic endorsement of the importance of face-to-face appeals. Regardless of the model estimated and the set of controls introduced, Gerber and Green found the impact of canvassing to be many times the effect of phone calls or mail. For example, in a large-scale experiment conducted during an election in New Haven, individuals who had been canvassed turned out to vote at a rate 8.7 percentage points higher than those in the control group.[105] By comparison, the impact of mail and phone calls was minimal, barely distinguishable from zero.[106] The authors have subsequently replicated this finding in a variety of other studies.[107]

We divided turnout expenditures into these and several other categories by again searching for key words or phrases

[105] Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment, (*American Political Science Review* 94:653-663) 2000.

[106] *Ibid*, p. 659. Phone calls may be more effective if the caller is familiar, such as a college student calling another college student, the sort of circumstance that rarely occurs with the paid phone banks that predominate in campaigns. See Alan S. Gerber and Donald P. Green, "Do Phone Calls Increase Voter Turnout?: A Field Experiment," (*Public Opinion Quarterly* 65:75-85), 2001.

[107] These papers are available at Yale University Institute for Social and Policy Studies, *Voter Mobilization Experiments, at http://www.yale.edu/isps/publications/voter.html.*

in the description of the purpose of each item. For instance, we listed as canvassing any entry that made reference to "canvass" (includes canvassing and canvasser), "field worker," "literature drop," "poll worker," or "walker." In the end, we identified seven distinct categories of expenditures: canvassing, mail, [46 (DEV. 1-Tab 2)] telephone, media, voter files, administration, and other/ unspecified.[108] The results show that parties spent the largest amount of soft money on mail ($14.9 million), telephone ($10.8 million), and voter files ($4 million).[109] Canvassing, the category of greatest interest and greatest impact, lagged well behind with just $1.2 million invested. Most of the money for canvassing was used to pay people to go door to door.[110] As a result, the

[108] Mail includes entries with the key words "mail," "postage," or "voter labels"; telephone includes "phone," "call," or "voter id"; media includes "ad," "advertising," "television," "TV," or "radio"; list includes "list," "voter record/abstract/data/disk/ history/ info/ file", "phone match." Administration includes rents, payroll taxes and a variety of reimbursements. Other/unspecified, the largest category, is dominated by expenditures like "GOTV," "Election Day worker," or "absentee ballot program" that are most likely canvassing, mail or telephone, but cannot be determined. Other/unspecified also includes almost $1 million of spending on consulting unrelated to the other categories.

[109] Voter files, a standard tool in modern campaigning, generally provide a list of registered voters in a locale. They may be purchased directly from jurisdictions or from list vendors who frequently add vital information like phone numbers or other contextual data to the file. These lists are particularly useful in guiding direct mail and phone banks so that campaigners may focus their efforts on citizens most like to turn out on Election Day, or, in the case of the recently registered, on those eligible to vote. They are probably of less value to canvassers who tend to go to all of the doors in a neighborhood, not specific doors.

[110] We reached this conclusion by observing the size of the expenditures and noting that the purpose of these expenditures— typified by entries like "Election Day canvasser" or "Poll worker"—appeared to refer to individuals hired. In addition, our analysis of a sample of

average soft-money expenditure for canvassing was just $168, compared to an average of $16,100 for each outlay for mail. Entries relating to canvassing account for more than one fourth of 28,157 cases in the data set, but these cases only comprise 3 percent of total spending.

It is possible that some of the $8.4 million in the other/unspecified category should be attributed to canvassing.[111] Unfortunately, descriptions like "voter registration" or "generic GOTV" make it impossible to determine whether the activity involved was canvassing or telephone or mail or something else. Even if we were to include all payments apparently made to individuals as canvassing, it would add less than [47 (DEV. 1-Tab 2)] $1 million to the total devoted to face-to-face contact.[112] Political parties in several states—led by the Democratic parties in Louisiana, Kentucky and New Jersey—did devote considerable resources to canvassing, but in other states such expenditures were minimal. Altogether, parties spent 20 times more soft money on phone calls and mail than they spent on canvassing.

The likeliest explanation for the neglect of canvassing is the organizational weakness of parties. Canvassing is not among the services routinely available from the campaign service industry, leaving parties to fend for themselves. But organizing an extensive face-to-face campaign—recruiting workers, providing materials and maps, handling logistics

disbursements described below confirmed that most entries were payments to individuals.

111 The same is true of the $4 million spent on voter lists, although in this case it is likely that these lists served the parties' phone banks and direct mail, not their door walkers.

112 This is accomplished by recoding all entries from the other/unspecified category where soft money expenditures were less than $200 as canvassing.

—is a fairly labor intensive enterprise, whether one uses volunteers or paid labor. This is the case, furthermore, whether the face-to-face persuasion takes place at a front door, the local mall, or a membership meeting. The fact that three state parties named above accounted for the vast majority of spending on canvassing (80 percent) suggests that most other state committees either did not have the capacity to organize a canvassing effort or were unwilling to devote the resources.[113] Gerber and Green speculate that "the long-term decay of civic and political organizations may have reached such a point that our society no longer has the infrastructure to conduct face-to-face canvassing on a large scale."[114]

[48 (DEV. 1-Tab 2)] We tested this hypothesis by examining expenditures of individual parties to determine whether they were for subcontracted services or for activities that the parties performed themselves. The sheer number of separate expenditures in the data set made it impossible to check the recipient of each payment. Instead, we drew a random sample of 250 expenditures and used the optical records maintained by the FEC to determine whether payments were

113 It is possible that large expenditures for canvassing in several other states may have been overlooked because of different reporting conventions. For example, an activity described as "GOTV canvassing" in Louisiana or New Jersey might have been called "Generic GOTV" elsewhere, making it impossible to determine the activity involved. The total amount of money at stake, however, is relatively small because of the low cost of hiring canvassers. As we note above, the average disbursement for canvassing was $168.

114 Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls and Direct Mail on Voter Turnout: A Field Experiment, (*American Political Science Review* 94: 653-663, 662) 2000.

made to a company for services or not.[115] Two hundred and twenty six of the items we scrutinized were payments to individuals or for services organized and conducted by the parties, while just 24 were disbursements to subcontractors. But the latter group included virtually all of the largest expenditures in our sample, so that total payments to subcontractors ($340,280) greatly exceeded spending on the parties' own activities ($78,957). This pattern is reflected in the larger data set as well. The 25 largest soft money expenditures accounted for over 15 percent of mobilization spending ($6 million). All of these large payments were made to subcontractors, and almost all of them were for direct mail or phone banks. By comparison, there were more than 19,000 separate expenditures of $50 or less that added up to just $550,000 of spending. Judging from the data of our sample, we would surmise that nearly all of these small disbursements involved activities that parties undertook themselves.

In sum, the parties' efforts to mobilize voters in 2000 were much less impressive than they may at first seem. The amount of soft money devoted to turnout efforts was a relatively small portion of the total amount available, and just a third as much as the [49 (DEV. 1-Tab 2)] parties spent on media advertising for their candidates. Even worse, the soft money that the parties did spend on mobilization went overwhelmingly to vendors to pay for phone banks and direct mail. These activities have been promoted as staples of

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[115] Most of these calls were easy to make. Payments to individuals were obviously signs of party activity, as were expenditures for stamps (though large payments may have been made on behalf of direct mail vendors) or for food or catering. We also categorized several large payments to local party organizations as expenditures by the parties themselves, though we could not be sure this money was not passed on to one or more subcontractors.

modern campaigning for years, but research shows that they have almost no impact on the likelihood of citizens' voting. Rather, experiments show that old-fashioned, face-to-face appeals are most effective in inspiring people to vote. This sort of canvassing was once the traditional focus of state and local party organizations, but in their dedication to serving candidates they are no longer interested in personal campaigning, and in their disrepair they may not be capable of mobilizing their voters.

There is no law requiring parties to spend wisely. The effectiveness of various strategies is difficult to test, especially during the heat of a campaign, and techniques that may appear to work well in one election can become outmoded later. Rather, we are responding to the concern that banning soft money will cause turnout to decline. We find that allegation to be groundless for the simple reason that the parties have done little to mobilize voters in recent years. The money has been there, but the commitment and the infrastructure necessary to organize an effective mobilization campaign have been missing. The parties have chosen to spend far more money to promote candidates than to turn out their vote, and they have chosen to hire others to send letters and make phone calls rather than organize their own, more personal effort to get people to the polls. There is more than enough hard money available to replace the soft money that parties have spent on mobilization, but it will be up to the parties to find ways to spend it usefully.

[50 (DEV. 1-Tab 2)] II. Issue advocacy

A. Regulating issue advocacy

A1. Candidate ads, candidate-oriented issue ads and pure issue ads

It took nearly twenty years for parties, interest groups, corporations, trade associations, unions and wealthy indivi-

duals to recognize that they could bypass FECA and still run thinly-veiled campaign ads by avoiding words that directly exhort viewers to vote for or against a candidate. These entities rely on the so-called "magic words" test to argue that their ads are not federal electioneering, but instead are speech about the issues of the day. For organizations and individuals who wish to aid their favorite candidates with television ads, the advantages of doing so in a way that avoids FECA's regulatory scheme are profound. Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public. Issue advocates may even rename themselves; so, in 2000 the Pharmaceutical Research and Manufacturers Association became "Citizens for Better Medicare" and two brothers from Texas became "Republicans for Clean Air," organizations that sound more impressive and credible than their true sponsors.

The first candidate-oriented issue ads were aired by the DNC in 1995 to promote President Clinton and immediately inspired more sizable campaigns the next year as labor unions and pro-Republican business groups turned to issue advocacy to support congressional candidates. Soon the practice became widespread. The Annenberg Public Policy Center estimated spending on issue advocacy at $135 million in 1996, and $509 [51 (DEV. 1-Tab 2)] million just four years later.[116] Using media tracking data, other scholars estimated expenditures on airtime alone in the top 75 media markets at

[116] Deborah Beck, Paul Taylor, Jeffrey Stanger and Douglas Rivlin, , "Issue Advocacy Advertising During the 1996 Campaign (Annenberg Public Policy Center, 1997), p. 3; Kathleen Hall Jamieson, Lorie Slass, Erika Falk, "Issue Advertising in the 1999-2000 Election Cycle" (Annenberg Public Policy Center, 2000), p. 4.

$31 million in 1998 and $260 million in 2000.[117] The disparity between the Annenberg figures and the expenditures for airtime is actually smaller than it may appear once overhead, expenses, inflation, and other costs are factored in.[118] By comparison, the same media tracking data show candidates spent $141 million on airtime in 1998 and, with the addition of a presidential race, $334 million in 2000.[119] Issue advocacy has come to rival, and in some cases outpace, advertising by federal candidates.

These issue ads, which appear overwhelmingly in the period just preceding Election Day, have had a great effect on campaigns and thus on elections. Especially in the most competitive districts—such as the Detroit media market where competitive presidential and senatorial races in 2000 prompted parties and groups to air almost 10,000 issue ads in just five weeks following September—viewers saw and frequently complained about a seemingly endless stream of political ads. At the same time, candidates struggled to regain control of their own campaigns in the aftermath of ads, and they also often confronted a shrinking supply of airtime

[117] See Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

[118] See Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising the 1998 Congressional Elections*, (New York: Brennan Center), 2000, p. 197. The estimated cost of each ad is almost certainly low, especially for issue advertisers who are not able to take advantage of "lowest unit rate" occasionally available to candidates.

[119] Since the presidential campaigns are limited to the size of their public subsidy the campaigns have turned to parties for any additional advertising on their behalf. Virtually all of the commercials run by parties in the presidential campaign were issue ads. In addition, the race for the White House attracted greater involvement by an assortment of groups sponsoring issue ads. See Expert Report of Kenneth Goldstein.

for their own ads. The central regulatory question raised by this flood of issue ads never went away: should these ads [52 (DEV. 1-Tab 2)] be considered as federal electioneering, "working for the election of a candidate or party," as Webster's dictionary defines it?[120] The answer is critical, for if these commercials are campaign ads they should certainly be treated in the same way that the law treats other campaign ads, but if they are genuine discussions of policy issues, there is no need to regulate them in the same manner.

The preponderance of evidence says that these ads are federal electioneering. Many of their sponsors have been frank about their intent to influence elections. For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.[121] The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.[122] The goals of the parties, especially in presidential elections where candidates and their agents have been intimately involved in planning and paying for their party's ads, can hardly be doubted. Survey results show that citizens overwhelmingly view these advertisements as intended to

[120] All references to electioneering should be taken as federal electioneering only.

[121] See Kevin Galvin, "Sweeney Unveils Reform Blueprint for Labor Federation," Associated Press, January 26, 1996.

[122] The Club for Growth, *Election 2000 Wrap-up, What's Next?, at http://www.clubforgrowth.org/news/wrapup.html* .

influence their support or opposition to particular federal candidates.[123]

Whatever may have been the intention of the sponsors of these ads, none of them used magic words. Two questions emerge: Does the magic words test distinguish between pure issue advocacy and federal electioneering? If not, would the alternate standard in BCRA work better? These questions are, for some observers, ideological. [53 (DEV. 1-Tab 2)] We regard them as essentially empirical matters to be evaluated in light of advertising practices in the last two election cycles. We address the first question (about the magic words test) in this subsection and the second (about BCRA's regulation) in the following subsection by examining media tracking data from 1998 and 2000 for the nation's 75 largest media markets.[124] Our analysis focuses on three types of ads: candidate ads, "candidate-oriented" issue ads and "pure" issue ads.[125] The first category represents the lion's share of all mass communications treated as electioneering under FECA.[126] The

[123] David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu.edu/outsidemoney/dictum/index.html.*

[124] We analyze a data set on television advertising compiled by a commercial tracking firm, the Campaign Media Analysis Group. Coding of these ads was supervised by Professor Ken Goldstein of the University of Wisconsin. These data are available for scholarly use going back to 1998. For more information, see Wisconsin Advertising Project, *at http://www.polisci.wisc.edu/tvadvertising* (last updated July 27, 2002).

[125] These candidate-oriented issue ads are also referred to as "sham" or "electioneering" issue ads. "Pure" or "genuine" issue ads address a public policy matter without promoting the prospects of a federal political candidate.

[126] Two other types of advertisements are also regulated by FECA: those which are either coordinated expenditures and independent expen-

second two categories represent the vital First Amendment question faced by the sponsors of BCRA as they attempted to create a means to objectively define candidate-oriented issue ads without unintentionally regulating pure issue ads.

The most direct way to evaluate the magic words test is to apply it to ads whose purpose—and origin—are clear. Commercials produced by candidates' campaigns are a perfect test group because their intent is self-evident, and they are regulated by FECA regardless of their language. Federal candidate ads appeared nearly 236,000 times in the top 75 media markets in 1998, 430,000 times in 2000. In 1998, just 4 percent of these spots used verbs like "vote for," "elect," or "defeat"; in 2000, just 5 percent did. Including slogans like "Smith for Congress," 10 percent of the candidate ads aired in 2000 would qualify as electioneering using the magic words test. The remaining 90 percent could have been categorized as issue advocacy had a party or group sponsored [54 (DEV. 1-Tab 2)] them. In short, the magic words test improperly categorizes candidate ads 9 times out of 10.[127]

One reason for this outcome may be that advertising practices have changed in the years since *Buckley*. No comparable data are available from that time period with which to test this hypothesis.[128] We believe, though, that the

ditures by parties and groups. Both are vastly outnumbered by candidate commercials.

[127] Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212), 2002.

[128] Krasno examined a videotape of 1976 advertisements for President Ford compiled by the Ford Presidential Library. Direct comparisons are impossible because there is no information about how often each of the separate commercials aired. Nonetheless, while the format and production values of these ads were noticeably different than today's, most of the individual spots did not use the language of footnote 52.

practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information.[129] In fact, commercial advertising is often so subtle that the object of the commercial, though always present, is difficult to discern. This atmospheric approach to commercial advertising—where the product is presented in various desirable tableaus—has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

If the magic words test fails to distinguish between candidate ads and either type of issue ads, what does? We separated candidate-oriented issue ads from pure issue ads [55 (DEV. 1-Tab 2)] with the help of undergraduate coders at the Universities of Arizona and Wisconsin who evaluated commercials by answering the following question:[130]

[129] Shopping channels, other products only available directly from a warehouse or distributor, and public television fundraising drives are obvious exceptions.

[130] Discussion of the media tracking data relies on earlier work or additional analysis performed by Krasno.

> In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?[131]

Several points speak to the accuracy of the coding of this item. The degree of inter-coder reliability was ex tremely high, even though no training was provided.[132] More reassuring, however, are several measures of criterion validity. Coders correctly regarded virtually all ads by candidates and parties as electioneering, while approximately half of the commercials sponsored by interest groups were rated as pure issue advocacy.[133] Moreover, the proportion of group ads categorized as electioneering increased sharply in the months immediately preceding the election.[134] That timing validates the coders' judgments.

The similarities between candidate and candidate-oriented issue ads, and the differences between these two types of commercials and pure issue ads do not end there. The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates

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[131] For the full text of the coding protocol see Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising the 1998 Congressional Elections*, (New York: Brennan Center), 2000, p. 193-5.

[132] The hope was to allow each student to assess the various ads using their own common sense rather than imposing a uniform standard. It is noteworthy that Professor Goldstein reports little confusion over this or any of the other items on the coding protocol.

[133] We refer here and elsewhere to the number of times commercials aired, not the number of discrete spots produced and aired at least once.

[134] The rise for pure issue ads was much less pronounced. See Appendix, Table 6. This Appendix includes a variety of tables providing additional information about the 1998 data set.

most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal [56 (DEV. 1-Tab 2)] office: candidates were featured in the text or video of just 6.4 percent of pure issue ads in 1998.[135]

Candidate ads and candidate-oriented issue ads also tended to cover the same themes. For instance, the top five issues raised in candidate ads in 1998 and 2000 were education (mentioned in 30 percent of ads), health care (27 percent), taxes (27 percent), Social Security (24 percent) and the background of the candidate (18 percent).[136] Candidate-oriented issue ads stressed virtually the same list of topics: health care (28 percent), Social Security (20 percent), taxes (20 percent), education (18 percent), and Medicare (17 percent). By contrast, pure issue ads stood out a bit for their content. The most popular themes in these spots, health care (29 percent) and Medicare (28 percent), are familiar, followed by a cluster of topics only one of which was the frequent focus of candidate-oriented issue ads: environment (9 percent), trade (9 percent), taxes (8 percent), and China (7

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[135] Ads were counted as identifying a federal candidate only when aired before the audience of his or her constituents. So, for example, a commercial about the McCain-Feingold bill only identifies candidates when it appears in the home states of Senators McCain and Feingold, not when it appears elsewhere. BCRA makes the same distinction.

[136] Ads were coded as having up to four themes. Coders chose from a list of approximately 60 issues in response to the following item: "Attached are a list of issues that frequently come up in the course of political commercials, such as education, the environment, and taxes. Please list the ones that come up in this ad in the order in which they appear." See Wisconsin Advertising Project at, http://www.*polisci.* wisc.edu/tvadvertising (last updated July 27, 2002).

percent). It is clear that one of the arguments for issue advocacy—that it may introduce subjects ignored by the candidates—applies with greater validity to pure issue advocacy than to the candidate-oriented issue ads.

Moreover, candidate ads and candidate-oriented issue ads also touched on more themes in each spot (averaging 2.6 and 2.2 themes in each commercial aired) than did pure issue ads (average of 1.3).[137] This pattern is consistent with our earlier observation that commercial advertising routinely provides viewers with a variety of causes to choose [57 (DEV. 1-Tab 2)] their product. Pure issue ads, however, appear less concerned with selling a product than with expressing a particular point of view or urging action on a specific policy matter before Congress.[138]

Finally, there is perhaps the most objective element of all: the timing of these ads. Candidate and candidate-oriented issue ads overwhelmingly appeared in the months before Election Day. Seventy-nine percent of the commercials aired by candidates in 1998 and 85 percent of candidate-oriented issue ads appeared after August. In 2000, the surge of advertising during the presidential primaries lowered the percentage of candidate ads aired during the last third of the year to 67 percent. Candidate-oriented ads followed suit with 74 percent appearing after August 31. By contrast most of the pure issue ads aired in 1998 (59 percent) and almost all

[137] This is the average number of themes identified by coders for each spot from the list provided.

[138] Furthermore, pure issue ads are largely prospective in their emphasis, either asking viewers to lobby officeholders regarding a future action or to change their opinion on some matter. Candidate-oriented issue ads are overwhelmingly retrospective in that they look back in time to characterize candidates' previous actions, occasionally using these evaluations to speculate about their future behavior.

the pure issue ads aired in 2000 (81 percent) appeared before September.[139] These findings reflect the different purposes of these advertisements. Commercials sponsored by the candidates and candidate-oriented issue ads are geared to Election Day and appear with increasing frequency as November approaches. Furthermore, as illustrated in Tables 4 and 5 in the Appendix, these ads are narrowly targeted to air in only the most closely contested elections. Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.[140]

[58 (DEV. 1-Tab 2)] Our examination of advertising shows that there were two distinct types of issue ads broadcast in 1998 and 2000: candidate-oriented and pure issue ads. The first are similar to ads sponsored by candidates for their emphasis on individual candidates, their thematic content, and their timing, as well as viewers' perceptions of their intent. Pure issue ads differ from the candidate-oriented variety in all of these ways. They rarely mention federal candidates. They emphasize a somewhat different set of issues and focus more narrowly on a single topic. They air throughout the year. They appear to viewers to express a point of view unrelated to the upcoming election. The magic words test, however, does not distinguish between these two distinct types of issue ads; indeed it does not distinguish between ads sponsored by candidates and any type of issue

[139] See Table 6 in the appendix to this report and its corresponding table in the Expert Report of Professor Kenneth Goldstein.

[140] For additional information about the targeting of issue ads in competitive races see Appendix, Tables 4 & 5. For a graphic representation of the timing of advertising and the congressional calendar, see Jonathan Krasno and Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212, 2002).

ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed. We are left with a crucial distinction that no longer distinguishes, one that consequently created a loophole in FECA through which emerged a whole new form of unregulated campaigning in federal elections. The result has been to devastate the regulatory structure Congress established in 1974.

A2. BCRA's regulation of issue advocacy

The BCRA contains several provisions that define electioneering communications. For state parties, the law redefines "federal election activity" as public communications that refer to a clearly identified federal candidate and promote, support, attack, or oppose that candidate.[141] For interest groups, the standard is different: electioneering communications are those that refer to a clearly identified federal [59 (DEV. 1-Tab 2)] candidate (within the area in which they are running), and appear within 30 days of the primary or 60 days of the general election. By distinguishing between different sponsors of ads, the Congress is merely following its own lead in FECA whereby all expenditures by candidates are treated as campaigning. Given parties' avowed purpose of winning elections, it makes sense to include their communications that mention a candidate within FECA, regardless of when those communications appear. Interest groups, however, may have a different set of goals, thus the risk of confusing their communications about issues with their electioneering is much greater. BCRA attempts to minimize this danger by taking a more permissive approach to their

[141] BCRA provides no special definition of issue advocacy for national parties but instead requires them to finance all of their activities with hard money.

advertisements by using the calendar to limit the period in which their speech might be treated as electioneering to 90 days over a two-, four-, or six-year federal election cycle. We focus on that attempt here.

The logic of BCRA's approach for groups seems compelling. At a minimum, advertisements intended to aide the fortunes of a political candidate must identify that candidate or his opponent and appear proximate to the election. Any ad that fails to mention the favored candidate or his opponent would likely be too obscure to affect a public whose normal attention to politics is short, as would an ad appearing more than two months from Election Day. A third consideration, words that make a direct appeal for the viewer's vote, may also indicate electioneering. As we have noted, however, language expressly advocating the election or defeat of a particular candidate has rarely been a part of campaign ads. The same data show that mentioning or picturing a candidate in the weeks leading up to an election were central elements of electioneering communications. BCRA defines campaign advertising in a way that makes sense both logically and empirically.

[60 (DEV. 1-Tab 2)] Does this definition also inadvertently sweep an unacceptable amount of genuine issue speech into the electioneering category? We addressed this question by using the media tracking data from 1998 and by referring to the Expert Report filed by Kenneth Goldstein about the 2000 data. In both years, the universe of genuine issue ads sponsored by parties is defined by coders' assessment of the purpose of these ads (see p. 55 above). Interest groups aired 11,785 pure issue ads in 1998, and almost four times that

amount, 45,001, in 2000.[142] But only a small fraction of these airings—6 percent in 1998 and 3 percent in 2000—appeared within 60 days of the general election and identified a federal candidate and, thus would have been regulated as federal electioneering.[143] These affected airings included nine separate commercials, three in 1998 and six in 2000, which aired 713 times in 1998 and 1,413 times in 2000.[144] While BCRA has very little effect on pure issue advocacy, its impact on candidate-oriented issue ads is striking. In 1998, 58 percent of candidate-oriented issue ads by groups identified candidates and appeared within 60 days of the election, and in 2000, 67 percent did. These, of course, are the spots

[142] These numbers differ slightly from those reported earlier by Krasno and Seltz and by Krasno and Goldstein because of additional coding performed for this litigation. For further discussion, see Appendix.

[143] The 2000 edition of *Buying Time* estimates the impact of BCRA differently. Instead of calculating its effect on genuine issue advocacy by dividing the number of "false positives"—pure issue ads incorrectly treated as electioneering by BCRA—by the number of pure issue ads aired throughout the year, the 2000 volume divides the number of false positives by the total number of group ads in the last 60 days that mention a candidate. The last number combines the false positives with the "true positives"—the candidate-oriented issue ads that BCRA was intended to affect. As a result, it is enormously susceptible to fluctuations in the volume of candidate-oriented issue advocacy. Since the absence of a presidential campaign in 1998 dramatically reduced the number of these ads, applying the 2000 edition's formula to the 1998 data set yields a different result for BCRA's 1998 impact: 14.7 percent. For a further discussion of these calculations see Appendix.

[144] One spot was added to earlier reports about 1998: a commercial featuring Senator John Breaux praising the good work done on teen alcoholism by Century Council and the Boys and Girls Club, and providing a toll-free number. This spot appeared one time in New Orleans just before the 60-day general election period began and two times immediately afterward.

that the Congress intended to regulate. It is clear that BCRA does a good job [61 (DEV. 1-Tab 2)] hitting what it is aiming at (candidate-oriented issue ads) and missing what it is not (pure issue ads).

Critics will surely complain that this analysis depends on subjective judgments made by coders about the purpose of the commercials. We believe those assessments, however subjective, are supported by a variety of additional criteria (see pp. 55-57). But the more important point is that these assessments correspond closely to the objective standards established by BCRA. BCRA's definition of electioneering is simple, concise, easily understood, and intuitively sensible.[145] The fact that it performs so well against the subjective impressions of individuals who examined the ads reassures us that this provision works as it was intended. The BCRA standards offer clear guidance to advertisers, and they separate candidate-oriented from pure issue ads quite effectively.

Critics will also question the impact of the 30-day period preceding primaries on our estimates of the percentage of pure issue ads affected by BCRA. The hodgepodge of different primary dates makes it difficult to factor this period into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all (p. 55). Indeed, our examination of 1998 shows this to be true: no pure issue ads

[145] Coders reported no problem determining whether a candidate was identified in any spot. Rather, the only source of confusion was whether an individual mentioned in an ad was a candidate or someone else. Advertisers may try to circumvent this criterion by seeking ways to refer to a candidate without clearly identifying him or her, but the more obscure these references become, the less certain their impact. In the end, we doubt many advertisers will adopt this approach.

would have been captured by the 30-day primary period.[146] In fact, we would argue that the percentages of issue ads affected by BCRA that we report are likely too [62 (DEV. 1-Tab 2)] high, perhaps much too high. The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline.[147] We have no data about how such spots aired during these missing time periods, but we have no reason to assume—given the lack of relationship between pure issue ads and the election—that these numbers were much higher or lower than we observed during 1998 and 2000. We do know, however, about those two years, when we combine them to simulate BCRA's effect on a longer four-year period, the results change slightly and offer further reassurance about the legislation's small impact on genuine issue advocacy.[148] In short, BCRA is remarkably successful in differentiating

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[146] This turned out to be fairly simple to calculate since only one additional advertisement—a spot by the National Federation of Independent Business touting its work with Congressman Sununu (R-NH) on tax simplification—identified a federal candidate in his or her district. This commercial appeared in Boston in January of 1998, long before New Hampshire's congressional primary.

[147] Since BCRA's impact is properly measured over the full life of an election cycle, it is appropriate to include all the pure issue ads that appear during this period in the analysis. See Appendix.

[148] It is worth noting, for example, that all of the pure issue ads affected by BCRA in 1998 involved Senate candidates, suggesting a six-year analysis is appropriate. By combining the two years for which we have data, however, we find that BCRA would have affected 4 percent of pure issue ads aired. Using the *Buying Time 2000* formula produces an even lower estimate: 3 percent. See Appendix.

between the vast majority of pure issue ads and candidate-oriented issue ads.

Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge numbers of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it [63 (DEV. 1-Tab 2)] should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

This point deserves amplification. Why did so few pure issue ads broadcast during 1998 and 2000 refer to a federal candidate and appear close to Election Day? Most were concerned only with issues, seeking to move public opinion on abortion or trade or unions. Candidates were irrelevant to these appeals; in fact, invoking them might unnecessarily politicize the underlying message of these ads and undermine their effectiveness. As for the ads attempting to lobby the government about a particular policy, some of these spots mentioned specific officeholders, like Hastert, but most of the examples we examined did not.[149] Rather, viewers were

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[149] Our evidence is mainly impressionistic, since coders were not asked to record whether ads asked viewers to contact Congress or their

asked to contact their Representative or their Senators, not specific individuals. This approach reflects the fact that media market boundaries are determined by the strength of their transmitters, not the boundaries of election districts. For example, the dominant media market in Hastert's district—Chicago—also reaches more than half the homes in thirteen other House districts. By focusing only on Hastert, more the 90 percent of the viewers, represented by other Members of Congress were essentially excluded from the message of this ad. In the real world, an advertiser in the Chicago area would have little reason to target an appeal [64 (DEV. 1-Tab 2)] so narrowly since any pressure exerted on any member of Congress is likely to serve their cause, even if only to bolster its supporters.

The practices of issue advocates in 1998 and 2000 suggest several alternative approaches for the ACLU, had it wished to air its ad without crossing the line dividing issue advocacy from electioneering. It could have—like most spots seeking to lobby Congress—urged its audience to contact their representative without identifying Hastert by name. Even if the Speaker was the only target of the ad, he could hardly have overlooked a surge of letters and phone calls reported by other Republicans (or even Democrats) in the Chicago area. Alternatively, the ACLU could have run its spot earlier

(unnamed) senators or representatives. Nonetheless, we do note the pattern exhibited in ads sponsored by Citizens for Better Medicare, an industry group that was the largest sponsor of issue ads in 2000 (see Expert Report of Kenneth Goldstein). Coders rated a large majority of their commercials as pure issue ads. None of these spots named a specific member of Congress; rather they asked viewers to "call Congress." By contrast, CBM ads coded as electioneering in their intent did use candidate names. There is another clear distinguishing feature between these two sets of ads: the pure issue ads aired mainly before September, but the candidate-oriented ads aired exclusively after Labor Day.

or later to avoid the 30-day period before the primary. The fact that most pure issue ads did not appear proximate to Election Day suggests that this is a viable strategy.[150] Advertisers engaged in battles over specific votes go public when the congressional calendar demands; thus, commercials lobbying Congress often appear many months from any election. Certainly, legislators pay special attention to public opinion during their campaigns, but the evidence is overwhelming that they attend to their constituents' desires throughout their terms.[151] If neither of these options was appealing, the ACLU could have run its ad with hard money and reported its expenditure to the FEC as an independent expenditure. Finally, the ACLU might simply have used mail, the Internet, print ads or phone banks to deliver its message.

In the end, it is clear that the sheer scope and volume of candidate-oriented issue advocacy since 1996 has been enormous. Initial reports suggest that the 2002 election is [65 (DEV. 1-Tab 2)] shaping up as more of the same and, without BCRA, we would expect the trend to continue. Candidate-oriented issue ads have accounted for hundreds of millions of dollars of unreported campaign spending, and in some races —starting with the presidential contest—have exceeded advertising expenditures by the candidates. The widespread use of candidate-oriented issue ads circumvents the will of Congress, one upheld repeatedly by the Supreme Court, to limit the source and amount of campaign contributions and to

[150] There is a solid practical reason to avoid the crowded period right before an election, particularly a heavily contested one: the availability and price of airtime.

[151] For example, see Anthony King, *Running Scared: Why Politicians Spend More Time Campaigning Than Governing*, (New York: Simon & Schuster), 1998.

require public reporting of receipts and expenditures for federal election campaigns. The Congress, thus, had substantial provocation to act to restore and protect the advances made under FECA.

In conclusion, we believe that the impact of BCRA is primarily an empirical question best evaluated with the extensive data on issue advocacy developed over the last half dozen years. Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering. These data also reveal that BCRA's definition of electioneering communications for interest groups distinguishes extremely well between these two sorts of issue ads, with the number of false positives—pure issue ads mistakenly categorized as electioneering—being but a very small fraction of the total ads of this type. Furthermore, the variety of formats in which pure issue ads appeared suggests that advertisers who wish only to address an issue can easily take one of several steps to avoid triggering BCRA. In short, the formula that Congress has developed is successful in realizing it own goal of regulating the great mass of candidate-oriented [66 (DEV. 1-Tab 2)] issue ads while affecting very few pure issue ads. Naturally, we wish that no pure issue ads would be inadvertently touched by BCRA, but the chaotic world of advertising is not so easily managed. We are satisfied that BCRA has a minimal effect on genuine issue advocacy, offers advertisers clear guidance and an array of options that serve nonpartisan purposes, and is, in short, a reasonable response to a serious threat against the existing campaign finance system.

B. The corruptive potential of issue advocacy

B1. Defining corruption

In our earlier discussion of soft money we argued that corruption encompassed bribery, undue influence and the more extreme forms of privileged access. We stand by that definition here, as we turn to issue advocacy. The following subsection (B2) provides an analysis similar to our evaluation of the corruptive potential of soft money, showing how issue ads may influence policy-makers to grant favors and access to those who purchase them.

The use of candidate-oriented issue ads for electioneering by an array of established interest groups, freshly minted "organizations," and parties in the last several election cycles has also created a broader set of problems about elections that we will address in this subsection. Our decision to place this discussion here is inspired in part by the Supreme Court's earlier concern for the "integrity of the electoral process," the controlling interest in campaign-finance and related jurisprudence before *Buckley*.[152] Indeed, by previous standards—and from our own perspective as long-time students of [67 (DEV. 1-Tab 2)] elections—we regard the recent use of issue ads as inimical to the integrity of the electoral system and, in that respect, corrupting.

We would judge the health of the electoral system by a few simple criteria. The first is choice: elections should offer

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[152] This includes two of the main precedents cited by the *Buckley v. Valeo,* 425 U.S. 946 (1976) court, *Burroughs v. United States,* 290 U.S. 534 (1934) and *Ex parte Yarbrough,* 110 U.S. 651 (1884). See Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance," (*Constitutional Commentary* 3:1 (1986)); Frank J. Sorauf, "Politics, Experience, and the First Amendment: The Case of American Campaign Finance," (*Columbia Law Review* 94:2 (1994)).

voters an alternative between two or more candidates with a reasonable chance of winning. As desirable as it would be for voters to like their choices, it is even more essential that more than one of the names on their ballot have some possibility of election. This suspense, of course, raises the stakes of voting for citizens and spurs turnout. It also provides the chief means for popular control of elected officials; legislators for whom defeat is unthinkable have much less incentive to heed or serve their constituents than officials whose careers are even slightly precarious. Obviously, practical considerations like the underlying partisanship of many jurisdictions and the popularity of many incumbents shrink the odds of truly competitive elections in most states and districts. Even taking these considerations into account, however, the number of contested races, particularly for the House of Representatives, has sunk to dangerously low levels: as of August 6, non-partisan observers believe that just 39 House districts out of 435 are "in play" in the 2002 elections, a phenomenally small number in a redistricting year and one that leaves more than 90 percent of Americans living in districts written off this November.[153]

Second, we would point to the importance of citizen participation. Voting is the main form of participation, but not the only one. Citizens may also participate in politics by becoming candidates for office, an enormous but vital commitment. Scholars are largely agreed that the difficulty in recruiting candidates is a principal reason for the lack [68 (DEV. 1-Tab 2)] of competition in elections.[154] We should

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[153] Adam Nagourney, "Economy Stirs G.O.P. Worry In House Races," *New York Times* (Aug. 6, 2002).

[154] For example, see Gary C. Jacobson and Samuel Kernell, *Strategy and Choice in Congressional Elections* (New Haven: Yale University Press, 1984).

also not forget another group of participants, the shrinking percentage of Americans who volunteer on election campaigns or partisan endeavors.[155] These activists have always been a small minority of the population, but their energy and commitment are vitally important to the system. On a practical level, we know that personal face-to-face contact is the most effective way to increase voting. But our interest in volunteerism is broader, for we would argue that politics—and political careers—begin with local associations, local issues, and local organizations. Replacing that activity with a system driven by cadres of professionals, mainly in Washington, threatens to turn citizens into passive consumers of politics instead of active participants.[156]

Finally, there is accountability, a term we used earlier with reference to parties. In this case, however, we refer not just to voters' ability to hold groups of officials responsible for the actions of government, but their ability to assess individual candidates on their own actions and words. Much as we might like to see more informative and perhaps higher-minded campaigns, we know of no easily applicable standards to judge them or means to achieve them. Instead, we do insist on the simpler idea that it be relatively uncomplicated for voters to associate candidates with the ideals they actually espouse, the programs they actually propose, and the tactics they actually use. Transparency, a main goal of both FECA and BCRA, is indispensable for informing vote [69 (DEV. 1-Tab 2)] choice and influencing candidates' behavior in addition to its value as a deterrent to influence peddling.

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[155] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), chapter 2.

[156] For a broader discussion of the larger issue, see Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

The explosion of candidate-oriented issue ads undermines all of these goals. To begin with, issue advocacy has radically escalated the financial arms race for candidates and all other participants in elections. The average spending by winning House candidates has nearly tripled over the last twenty years with almost half of that increase coming after the first widespread use of issue ads in 1996.[157] Astonishing as the average expenditures of 2000's winners—over $850,000—may seem, this number is actually misleading because the vast majority of incumbents faced little more than token opposition. Candidates in the most competitive races averaged closer to $1.5 million.[158] Issue ads have helped drive these expenditures up by forcing candidates to consider not only what their opponents may do with hard money but also what outside groups do with soft money. Candidates have responded by raising more, spending more, and saving more; FEC reports show candidates with considerably more cash on hand following the 1998 and 2000 elections than previously.[159] And parties, given the opportunity to avoid limits on coordinated expenditures that encouraged them to allocate their resources over many states and districts, have spent most of their issue advocacy dollars on

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[157] Federal Election Commission, *FEC Reports on Congressional Financial Activity for 2000, at http://www.fec.gov/press/051501congfinact/051501congfinact.html* (May 15, 2001).

[158] *http://www.cfinst.org/studies/vital/3-3.htm.*

[159] For House figures see Federal Election Commission, *Financial Activity of General Election U.S. House of Representatives Candidates —1988-2000, at http://www.fec.gov/press/051501congfinact/tables/gehouse.html* (May 15, 2001). For Senate figures, see Federal Election Commission, *Financial Activity of General Election Senate Candidates—1988-2000, at http://www.fec.gov/press/051501congfinact tables/gesenate.html* (May 15, 2001).

just a [70 (DEV. 1-Tab 2)] handful of the best-funded House and Senate candidates, further raising costs in these races.[160]

This increased spending raises the fundraising bar for candidates and potential candidates. For individuals contemplating a run for federal office, the question that they have long been confronted with—"how much money can you raise?"—has taken on new urgency and new dimensions as the price of viability goes up and up.[161] It is obvious that the rising costs likely price some potential candidates out of the market, affecting both the nature of choices in many races (due to the effort to recruit rich candidates able to finance their own campaigns) and its existence in others (where potentially viable candidates choose not to run).[162] For the candidates who do run, the constant attention to their fundraising becomes another hurdle as parties and groups who run issue ads try to "target" their efforts in races where their spending might tip the balance. Thus a challenger who

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[160] This reflects the parties' effort to choose races where their involvement might tip the balance. But with parties and many interest groups all trying to do the same thing, outside involvement is concentrated in relatively few districts. Because of diminishing marginal returns, it is unclear whether this spending has any appreciable impact on the vote. See Jonathan S. Krasno, "The Electoral Impact of 'Issue Advocacy' in 1998 and 2000 House Races," in Kenneth Goldstein and Patricia Strach, eds., *The Medium and The Message,* (Upper Saddle River, NJ: Prentice-Hall), 2003.

[161] On the number of challengers raising various amounts of money, see http://www.fec.gov/press/051501congfinact/tables/number_of_house_nonincumbents.html

[162] The fact that the number of competitive House races (including 1998 and 2000) has fallen to its lowest point in several decades during a period in which party and interest group spending on issue ads was plentiful and matched by a rise in candidate receipts suggests, contrary to the conventional wisdom, that inadequate overall funding in not a main reason for the shortage of hard-fought campaigns.

has raised $1 million (no longer such an impressive amount) and is a half dozen points back in the polls is seen as a less fruitful investment than one who has raised $2 million and is only three points behind, even though victory seems solidly in reach for both of them. The result is that standards of viability rise steadily, leaving fewer races that seem winnable or worth investing in. Put another way, we find it highly unlikely that [71 (DEV. 1-Tab 2)] just 39 House seats are "in play" this November[163] in the sense that victory is an all but foregone conclusion for one of the candidates, especially in early August when most campaigns have barely begun to contact the public.

The emphasis on financial resources also leaves non-financial resources undervalued. One sign is that candidates with potentially strong bases of support or formidable organizational capacity are often overlooked in favor of those with healthy bank accounts. Another is something we discussed earlier in reference to party-building: the failure of the parties to invest resources in their organizational structures. Their approach has been driven by demands to provide direct aid to candidates, particularly television advertisements. The result is that state and local parties have been used to move money around and to purchase advertising, not to build strong organizations, recruit activists, or engage in grassroots campaigning. Many interest groups play a similar game, focusing on advertising to the apparent exclusion of almost everything else.[164] Citizens are left as passive consumers of political campaigns conducted for their benefit by trained professionals rather than as participants in the

[163] Adam Nagourney, "Economy Stirs G.O.P. Worry In House Races," *New York Times* (Aug. 6, 2002).

[164] The AFL-CIO, NAACP and Christian Coalition are notable exceptions.

struggle to lead the nation. Granted, technological change has played the major role in this transformation, but the growth of issue advertising has accelerated the process, leaving the grassroots to wither.

Finally, the impact of issue advocacy on accountability is unmistakably disastrous. The Annenberg Public Policy Center keeps tabs on over 100 groups (excluding parties) that sponsored issue ads in 2000. Some were familiar, but many others—"Voters for Campaign Truth," "Aretino Industries," "Montanans for Common [72 (DEV. 1-Tab 2)] Sense Mining Laws," "American Seniors, Inc."—were organizations about which literally nothing was publicly known, including information about their sponsors, their finances, and the extent of their activities.[165] Others, of course, turned out to be fronts for trade associations, labor unions, and even wealthy individuals, but these revelations came courtesy of reporters or, in some cases, the groups themselves. By creating organizations with names like "Citizens for Better Medicare" (Pharmaceutical Research and Manufacturers Association) or "American Family Voices" (American Federation of State, Local and Municipal Employees), the sponsors added credibility to their appeals and offered anonymity to their donors, but these advantages were realized only by withholding information from the public.[166] By comparison to all other players in campaigns—candidates, parties, and PACs—these organizations were enigmas.

Beyond the true identities of many issue advocates, there is also their relationship to the candidates' campaigns. In many

[165] Issue Ads @ APPC, *Club for Growth, at http://www.appcpenn.org/issueads/gindex.htm* (last modified Jan. 2001).

[166] Sometimes the benefits of a particular name are subtle. We found identical ads aired against two Republican incumbents by separate interest groups, FAIR and Coalition for the Future American Worker.

instances, the degree of synchronization between the issue advocates and the candidates' campaigns belie the notion that issue ads are truly independent. For example, candidate ads in 1998 and 2000 were overwhelmingly positive in their tone, commercials whose primary purpose according to the coders was to "promote" a specific candidate. Issue ads, by contrast, were rarely positive; instead they usually concentrated on attacking the opponent or, somewhat less frequently, on drawing contrasts between pairs of candidates. Even ads that contrast candidates often have a critical edge to them, making them similar to pure attack ads. This pattern suggests a division of labor in campaigns where candidates take the high road and issue advocates [73 (DEV. 1-Tab 2)] are left to do the dirty work of bloodying the other side.[167] We are skeptical that viewers even noticed this division of labor, yet its existence illustrates the difficulty voters face determining who bears responsibility for the commercials they see.

B2. The corruptive potential of issue advocacy

Issue advocacy, being in part a style of advertising, presents a somewhat different set of challenges to the integrity of the electoral system than does soft money. Those challenges, however, include many of the same concerns relevant to our earlier discussion of soft money and corruption. In particular, we believe that issue advocacy also produces special avenues of legislative influence for their sponsors and funders. The structure of the campaign finance system and the interests of the players within it make issue advocacy an attractive tool for those seeking to influence

[167] This situation is similar to earlier allegations that the Bush campaign of 1988 quietly encouraged "Americans for Bush," an independent group to air an ad that used Willie Horton's mug shot, allowing the campaign to disclaim any responsibility for this commercial.

public officials. In this section, we return to the same definition of corruption we used earlier in conjunction with soft money to address the corruptive potential of issue advocacy.

Our analysis begins with the secrecy surrounding issue ads. Earlier we noted the nearly complete lack of disclosure of receipts and expenditures for issue advocacy, and how it reduces citizens' ability to discern the source of many of the communications they witness during a campaign. Secrecy is one of the outstanding characteristics of issue ads, especially those financed by interest groups. As a result, we—and regulators—are hampered by a remarkable paucity of information about them. The media tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation. Nonetheless, the dangers of issue advocacy are plain to see.

[74 (DEV. 1-Tab 2)] This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials. Disclosure, of course, is a main accomplishment of FECA; it was seen by its sponsors and by the Court as an essential element—along with limits on contributions to candidates—in the Congress's system to guard against various forms of corruption. In fact, disclosure has been a central feature in reforms long predating FECA and in most states, and courts across the land have repeatedly affirmed attempts to make campaigns report their financial transactions.[168] Among its various advantages, disclosure is thought to combat

[168] Indeed the first precedent on campaign financing noted by the *Buckley* court, *Burroughs v. U.S,* involved the constitutionality of disclosure requirements. See Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance," (*Constitutional Commentary* 3:1 (1986)).

corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them.

One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure. A serious argument advanced, primarily by conservatives, holds that campaign financing ought to be deregulated and disclosed, since transparency alone is sufficient to insure against corruption. We remain thoroughly skeptical about the full sweep of these claims, yet we share the same desire to shed light on the financial transactions of campaigning. The public's interest in revealing these transactions is countered by the private interest of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this activity. In the [75 (DEV. 1-Tab 2)] growing opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases, too.

Among the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations—all without making information known to the public—the example of "Republicans for Clean Air" stands out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor

Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign.

One remarkable aspect of this situation is that the pivotal South Carolina primary came and went without voters there discovering who was responsible for these ads. At the same time, it is impossible to imagine officials of the Bush campaign were in the dark about "Republicans for Clean Air." According to press estimates, the Wylys spent $25 million on their ads for Governor Bush.[169] We find it inconceivable that an expenditure of that magnitude could remain unknown to the small circle of financial leaders close to both the Bush campaign and the Wylys (including Charles Wyly himself) or the even smaller circle of Republican media consultants. When the Wylys' involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from "Republicans for Clean Air."[170] After the election, knowledge of the Wylys' activities during the primaries inspired reporters to pay particular attention to [76 (DEV. 1-Tab 2)] the brothers' role in advising the Vice President in connection with his energy task force.[171] In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually

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[169] The $25 million figure comes from the Annenberg Public Policy Center.

[170] T. Christian Miller & Janet Wilson, "Campaign 2000: McCain Blasts Pro-Bush TV Ad Campaign Financed by Texans," Los Angeles Times, March 4, 2000, p. A16.

[171] Craig Gordon, "The Fight for Computer Associates," Newsday, July 2, 2001, at A3.

broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start. BCRA would accomplish this.

Finally, issue advocacy, like soft money, allows funds from corporate and union treasuries to return to the electoral sphere after decades of absence. The purpose of the long-standing bans on these funds is multifaceted, but we focus on their potential to corrupt. That potential is largely determined by the sheer size of the financial resources available to corporations and unions. We do not pretend that wealthy individuals like the Wylys cannot mobilize enormous sums of money, but corporate and union assets dwarf all but the largest personal fortunes. Congressional fears of the potential impact of these funds both on elections and on legislative processes were a main reason for prohibiting them. We see the dangers as no less real today, especially as the technology of campaigning has changed and the emphasis on money has increased enormously along with the willingness of many corporate and unions leaders to participate in the electoral arena. For legislators to defy the wishes of Bill Gates or the executives of Microsoft is one thing; to defy Microsoft itself—should the company choose to dedicate a substantial part of its treasury to federal electioneering—remains quite another. It is difficult to point to specific examples of corporate influence felt through issue advocacy because of the newness of the phenomenon and the lack of disclosure. But the potential for legislators to perceive greatly higher stakes, to cite one example, in the lobbying they [77 (DEV. 1-Tab 2)] receive from the pharmaceutical industry because of the millions of corporate funds spent on candidate-oriented issue ads by Citizens for Better Medicare seems real enough.

B3. Appearances

Assessing public perceptions of candidate-oriented issue ads and their impact on public opinion is difficult because of the sheer complexity of the subject. Few people are aware of the distinction between express and issue advocacy, let alone the enormous consequences for behavior that flow from it. But because citizens are the intended audience for these ads, it is fair to ask what they think of them. The best answer to this question comes from "Dictum Without Data" by Professor David Magleby. Magleby conducted a survey using interactive television to show combinations of eight different issue ads aired in 2000 to a sample of 2,035 respondents.[172] All of the ads—a pair of spots from the presidential campaigns, from the parties' national committees, and from interest groups (one favoring Bush and the other favoring Gore), as well as two "pure" issue ads that mentioned no candidates —are entirely typical of the different types of commercials that aired in 2000.[173] Respondents were shown a random selection of three of the eight ads, eliminating concerns about ordering effects. Several of their perceptions are relevant here.

When asked to assess the "*primary* objective or purpose of the ad" (emphasis in the original), at least 85 percent of respondents found that the four issue ads by parties and interest groups were intended to persuade them to vote for or

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[172] David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu.edu/outsidemoney/dictum/index.html.*

[173] The two interest group ads were American Family Voices, which attacked Governor Bush as beholden to special interests, and the Republican Leader Coalition, which criticized Vice President Gore for his stands on Medicare and Social Security.

(much more often) against a candidate and only as many as 11 percent thought one of these ads was [78 (DEV. 1-Tab 2)] concerned mainly with presenting an issue.[174] In contrast, viewers were less likely to interpret the candidates' ads as electioneering (the results ranged between 64 and 74 percent) and more likely to see them as issue-oriented (20 and 30 percent).[175] These conclusions held for both the pro-Bush and pro-Gore ads in each category. It is likely that the issue ads seemed more partisan than those sponsored by the candidates because parties and groups criticized the opposing candidate while the Bush and Gore ads featured them speaking on camera about their plans without mentioning the other. This pattern is familiar; the overwhelming majority of candidate ads are positive in tone, while parties and groups emphasize attacks or commercials that contrast the candidates.[176] Respondents did draw an enormous distinction between these spots and the pure issue ads: at least 70 percent felt the primary objective of these latter ads was to present an issue and just 13 percent perceived any electoral purpose. In short, respondents' perceptions of the intent of the ads were remarkably accurate.

The respondents were less accurate, however, in determining who was responsible for a commercial.[177] In response to the question asking who paid for an ad, just over 60 per-

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[174] All the results discussed in this paragraph are summarized in Table 1 (Appendix).

[175] We discuss twin sets of numbers because two ads were shown in each category, one favorable to Bush and one to Gore.

[176] Krasno and Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," (*PS* 35, No. 2: 207-212, 2002).

[177] All the results discussed in this paragraph are summarized in David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building, at http://www.byu. edu/outsidemoney/dictum/index.html.*

cent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on [79 (DEV. 1-Tab 2)] these ads are almost completely ineffective. We applaud the section of BCRA mandating that they be made more prominent. But even if they were easier to read, we suspect that viewers would judge the ads on their underlying message, not the accompanying attribution. The confusion over sponsorship also illustrates the problem of accountability created by these advertisements, for one would need a fair amount of expertise, sharp eyes, and perhaps research skills to determine who was behind many of the commercials on television in an election year.

Ultimately, do these candidate-oriented issue ads, however confusing, appear corrupting to citizens? From our perspective there is no doubt that they do. The combination of findings above—candidate-oriented ads are seen as electioneering and they are frequently assumed to come from the candidate—show that the distinction between the actions of candidates and those of parties and interest groups is largely lost. By itself, the conflation of candidates with other, self-interested actors is disturbing and gives the appearance of impropriety. It also indicates that efforts to keep these actors separate from one another have little impact on public opinion. Citizens have the opportunity to view the results of decisions that candidates, parties, interest groups and their legions of consultants make, but they are in no position to see how these decisions get made or whether deals are made and understandings reached. From the perspective of the nation's

living rooms, most of the ads by parties and interest groups are no different than those by the candidates, nor do citizens have any reason, aside from blind faith, to assume that allies are not working in concert.

We conclude by recalling that campaign finance law is intended to increase public confidence in elections and campaigns. Yet the campaign finance system, without [80 (DEV. 1-Tab 2)] BCRA, asks citizens to disregard what they see, hear, and think—that the issue ads on their television sets are clearly designed to help or hurt a candidate—and believe that they are watching a rational, nonpartisan discussion of issues. No confidence can be built on a public reaction that either their senses are deceiving them or that their government is. We would argue that campaign finance law must have "integrity," so that undermining that integrity is neither good for the perception of the law nor for the government that makes it. The rise of candidate-oriented issue ads in recent elections has made a mockery of FECA, diminishing the transparency of its regime and demeaning its reasonable limits on contributions. Many Americans see those ads as no different than those run by candidates except that they are generally meaner and more aggressive. Pretending they are not campaigning generates further cynicism about the law and damages public confidence that government has the will and means to restore its integrity.

III. The relationship between soft money and issue advocacy

A. The hydraulics of campaign finance

Scholars and journalists have long used hydraulic metaphors to describe the campaign finance system. Cash flows like water with pressure behind it. Thus, if a point of exit or entry is closed off, the money will seek another route. Decades of experience with FECA show that political actors

strive to locate and exploit the most vulnerable points in the system. For FECA's critics, the hydraulic metaphors suggest the folly of campaign finance laws, especially the impossibility of controlling virtually uncontrollable behavior. Since any attempt to regulate campaign financing beyond the most general or egregious behavior is bound to fail, why bother?

[81 (DEV. 1-Tab 2)] This perspective ignores the obvious fact that hydraulic systems—including the infamous leaky garden hose—do manage to control and direct the flow of water. We would argue that these metaphors really demonstrate the need for attentiveness to the condition of campaign finance regulation and flexibility in responding to new developments. Practices change and the Congress, courts, and regulators need to adapt to new realities lest the entire system be overtaken with leaks and decay. No one expects any hydraulic system to last forever; just as plumbing and garden hoses are patched and repaired, so must be FECA. It is evident from the Congressional Record that fixing the holes that had developed in its structure, especially in the last half dozen years, is precisely what the sponsors of BCRA had in mind. Their goal was not to break new ground but to return to the status quo circa 1988 (in the case of soft money) or 1995 (in the case of issue advocacy).[178]

The hydraulic metaphors also illustrate another aspect of campaign financing: the degree to which the various components are interrelated. Pressure at one point may affect the entire system, just as a leak may cause all the nearby money to go rushing toward it. The most basic sort of relationship in the hydraulics of campaign financing is between money flowing in and money flowing out. The demand for

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[178] Others may date the start of soft money from its first appearance; in this report we date it from its first widespread use in campaigns.

funds leads politicians, parties, and groups to seek new ways to raise money, and the availability of funds sends these actors searching for ways to spend them. This symbiosis is clearly evident in the relationship between soft money and issue advocacy. Soft money came first, but expenditures were limited to a fairly narrow set of purposes. The Dukakis campaign in 1988 managed to find ways to use these moneys to fund substantial parts of [82 (DEV. 1-Tab 2)] their efforts. Those activities, however, required what seems in retrospect to be relatively modest amounts of money. The invention of issue advocacy, or, more accurately, the realization that issue ads could be used to promote specific candidates, came next with the purported success of the DNC ads supporting President Clinton in 1995. Once advertisers understood the ramifications of this development—that they could use soft money to pay for television commercials, the most basic and expensive staple of electioneering—the demand for soft money surged. The dramatic growth in soft money and issue advocacy in recent election cycles are thus connected, and they are not easily decoupled.

The history of campaign financing is a story of evolution as participants have sought out and exploited weaknesses in the system, with each new innovation quickly adopted by others. This dynamic has led to a series of "unanticipated consequences" stemming from FECA or from subsequent administrative or judicial actions. This record provides a cautionary note about any attempt to predict, especially in the long range, the impact of BCRA. Nonetheless, our experience as students of campaigns and campaign financing, and our knowledge of the goals of contributors and political committees, make it possible to discern the broad contours of the likely consequences for options facing the courts.

No crystal ball is necessary to see the future should the courts overturn both the provisions on soft money and issue

advocacy in BCRA. The steep growth in soft money and issue advocacy since 1996—including the run-up to the 2002 elections—will continue with some inevitable leveling off. Our forecast is predicated on the very real advantages that soft money and issue advocacy offer practitioners. Soft money is, [83 (DEV. 1-Tab 2)] especially compared to the small-dollar donations required by FECA, a quick, efficient, and lucrative means of raising large amounts of money. Not only is it easier for the parties or candidates to find a single $100,000 donor than one thousand $1,000 contributors, but also the fundraising costs associated with the first are generally much lower, leaving a greater net profit from soft money donations. Under those circumstances, it is no surprise to find, as we did in Missouri, that parties may become largely or entirely dependent on large donations (p. Z). For donors, soft money and issue advocacy allow corporations and unions to avoid old prohibitions on the use of their treasuries for political purposes. They also let the well heeled elude the contribution limits in FECA, and in some cases its disclosure requirements. In short, the myriad practical advantages of soft money and issue advocacy, particularly when used in concert with one another, are so profound that their growth would be certain.

This growth would have a variety of ramifications for politics. Several of the trends we noted earlier are certain to continue, including the rising cost of campaigns (as the parties and interest groups weigh in), along with the increasing centralization of funding in the hands of national organizations and the professionalization of campaign services. Citizens and political organizations will feel the effects of these trends in several ways. First, the low levels of electoral competition and voter turnout of the last half dozen years are likely to persist. The cost of campaigns will affect potential candidates' decision to run or not, and the

ability of national organizations to lavish funds on targeted races will focus resources on the favored few leaving many candidates unable to run serious campaigns. Many Americans will find themselves in states and districts where their votes are hardly sought. For others, attempts to encourage voting will be [84 (DEV. 1-Tab 2)] largely confined to phone calls and direct mail purchased through subcontractors. The parties will be even richer than they are now, but there is no reason to expect those riches to translate into greater citizen activity in them. Rather, we expect the parties to continue to function mainly as fundraising vehicles to augment and occasionally overshadow the efforts of individual candidates. Political decisions and strategy will be set from the top, and citizens will be viewed as consumers of political propaganda, not as participants in party governance or in campaigning.

The potential for actual and perceived corruption in such a system will be proportional to the great sums of money moving through it. Earlier we addressed the corruptive potential of soft money and issue advocacy separately. Taken together, the problems are multiplied. The race to raise increasingly large sums of soft money is fueled by the demand for candidate-oriented issue ads. That demand insures more aggressive tactics by the parties and by interest groups to solicit large donations. Once the money comes into the system, it is laundered by cycling it through state parties or through interest groups to create maximum flexibility and minimum transparency to the public. Indeed, it is the attractiveness of an unregulated system of campaigning that makes soft money and issue advocacy so irresistible to those seeking to influence voters or public officials. These advantages will lure larger sums into the unregulated world of soft money and issue advocacy. In response, citizens will react with continued suspicion of their elected officials and their government, particularly when scandals give special

resonance to allegations that donors might have received preferential treatment.[179]

[85 (DEV. 1-Tab 2)] In short, we expect the future without BCRA to be more of the same sort of campaign politics we have seen over the last half dozen years, with the emphasis on more. If we were to offer one deviation from this vision of an extended status quo, it would be an increasing diversion of party funds to groups under their control or that of trusted allies. There is already some sign of this development in the establishment of 527 groups affiliated with party leaders and in the parties' donations to interest groups.[180] We suspect the desire to avoid any disclosure of receipts and expenditures and to circumvent the allocation formulas that require parties to combine their soft money with some hard money will lead the parties to play a larger role in interest group politics, either in creating their own or in sending funds to their allies.[181] The coordination with groups will not be achieved

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[179] We note again that perceptions of corruption are likely to vary depending on a variety of factors including public satisfaction with the performance of government and the presence of a galvanizing event, like the Enron scandal, to focus attention on political donations.

[180] See "Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills," Public Citizen Reform, February 2002. Also from the same source, see "Déjà Vu Soft Money," Public Citizen Reform, April 2002; "Off to the Races," Public Citizen Reform, *at* http://www.citizen.org/documents/ 1stQ2002_527Report.pdf. In addition, the Annenberg Center reports that a group affiliated with House Majority Whip Tom DeLay (R-TX), "Americans for Economic Growth," ran issue ads against five Democrats during the 2000 campaign that closely resembled spots aired earlier by the NRCC. See Issue Ads @ APPC, *Club for Growth, at http://www.appcpenn.org/issueads/American's%20for%20Economic%20Growth.htm* (last modified Jan. 2001).

[181] Donations to some of these groups may be tax deductible, another benefit for donors.

by having the chairs of the DNC and RNC serve on the boards of various groups. Rather the coordination will be managed through networks of donors and party functionaries, and through the omnipresent offices of campaign consultants who help run both the parties' and interest groups' issue advocacy campaigns.

What if BCRA survives court challenge? This is, of course, the outcome we favor in light of our analysis of its effect on politics, the parties, and the public. Again, a fairly straightforward model of the post-BCRA world exists in the period prior to 1995.[182] Many complaints might be lodged against that system—and many were, starting with [86 (DEV. 1-Tab 2)] concern about the power of PACs—but by comparison to today, the sums of money moving through it were smaller and the fears of corruption then seem almost quaint.[183] Electoral competition as measured by the number of close races for the House of Representatives was higher than it is now, although not particularly high.[184] Voter turnout, too, was higher than currently, but again not particularly high.[185] Whatever the strengths or weaknesses of that supplanted system, one obvious point stands out: the absence of large-scale soft money receipts by the parties (at least by

[182] Soft money existed earlier, but we date the beginning of the current system to 1995 when candidate-oriented issue ads make their appearance.

[183] Most attention was focused on the role of PACs, limited by law to donating up to $10,000 to a federal candidate ($5,000 in both the primary and general election). Even aggregating all the PACs in a single industry, for example, rarely resulted in donations rivaling the amounts of soft money given from a single source.

[184] The Campaign Finance Institute, at http://www.cfinst.org.

[185] See Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 2001-2*, (Washington: American Enterprise Institute), 2002.

today's standards) and of candidate-oriented issue ads by parties or groups. The parties and interest groups—not to mention candidates and citizens—still managed to thrive in those days, leading us to conclude they would thrive once BCRA goes into effect. There is simply no reason to think otherwise.

The situation in 2003, should BCRA be upheld, will be different in one important respect from earlier times: the sheer amount of money in the parties' coffers. The hard money receipts of the parties are several times larger than they were a decade ago. The largest part of this money (after expenses) has gone to candidate-oriented issue advocacy in the past two election cycles. With that option off the table, parties will face intense pressure to find useful ways to spend their hard money. Our hope is that some of it may go toward a real program of grassroots party building. That investment will, naturally, have to compete with the parties' other priorities, notably their desire to provide immediate, direct aid to candidates. The resources, even without soft money, are [87 (DEV. 1-Tab 2)] available to sustain a healthy level of investment in state and local organizations. The fact that the parties, in the absence of soft money, will be forced again to rely on small and medium donations for their funding will encourage them to expand their outreach efforts and may make party building more attractive. These changes in the hydraulics of how parties raise and spend money have led some congressional supporters and scholars to argue that BCRA will encourage stronger parties.[186] We are cautiously optimistic that they are right.

[186] See, for instance, Anthony Corrado, "Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing," (Tempe: *Arizona State Law Review* forthcoming).

B. An historical perspective

Soft money and issue advocacy come together in one more crucial way—in their challenge to the integrity of Congress's regulation of campaign finance. Both are successful exploitations of loopholes in the 1974 legislation by political parties and other groups that have left its regulatory apparatus in disarray. Neither existed in 1974, and neither could have been anticipated then. Both reached their new importance in the 1990s, and both were clearly major stimuli to the Bipartisan Campaign Reform Act of 2002. Congress and the American people saw the logic of extending a transparent regulatory system to include new practices and their practitioners. Both the raising and spending of big soft money contributions and the media "campaigning" in the guise of discussing public policy had made the FECA an object of scorn and despair. In both instances they had grown so quickly simply because they were largely unregulated.

The American political parties, never mentioned in the text of the U.S. Constitution, have assumed an informal "constitutional" role in institutionalizing and organizing the emergence of a mass electorate and popular democracy in the Nineteenth [88 (DEV. 1-Tab 2)] Century. For more than 150 years they have continued that role by structuring political debate and alternatives, by recruiting and nominating candidates for public office, by mobilizing voters, and by organizing legislative chambers. Their visibility as the most salient labels and symbols of our politics makes them virtually synonymous with politics itself. All of that has assured parties a special and preferred status among political organizations. Having so important a position in American electoral politics, the parties also became lightening rods for the reform of those politics. Sometimes they were themselves the objects of reform—in the mandating of party conventions and layers of party organizations in the states,

and in the creation of direct primaries, all in response to the unrestrained power of local party machines and their autocratic bosses. Sometimes, as in the last two Congressional reforms of campaign finance, party reform was a secondary consideration. In both cases governmental action added to the web of regulation affecting the parties; in both it also reflected a legislative commitment throughout the country to protect the integrity of electoral and representational processes.

So, while the two major parties have enjoyed a duopoly over the organizing of electoral choice, candidates for office, and public officeholders for well over a century, they have also been the object of major state and federal regulation. And yet, they have long enjoyed many legislated benefits. In most states party money is only modestly regulated, and in some of them parties receive various public subsidies.[187] The Congress has not hesitated to treat their campaigning more severely than the states, but it subsidizes, very generously, the parties' national conventions and their presidential candidates. The resulting, somewhat contradictory status under American law—the [89 (DEV. 1-Tab 2)] combination of favor and disfavor—has, as we have noted, led one leading scholar of the parties to view them as a form of public utility, replete with the combination of privilege and restraint that governs a local electric company.[188]

Interest groups, on the other hand, were historically not greatly regulated, except for the general but toothless requirements that they register their lobbying with the Congress and state legislatures. Because they long stayed out

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[187] We include both the public funding of party organizations and their nominees, and tax credits or rebates for contributions for parties.

[188] See fn.56.

of electoral politics, they were caught up in very few legislative attempts to protect the electoral process. Corporations and labor unions were prohibited from contributing to federal candidates in the first half of the Twentieth Century, but only with the development of political action committees (PACs) just before mid-century did groups, including unions and corporations, enter electoral politics and begin funding candidates.[189] Consequently, PACs of corporations, unions and associations fell under the comprehensive regulation of all contributors in the FECA of 1974. Finally, with groups and organizations of all kinds making soft money contributions and buying issue ads in very noticeable quantities, they were folded into the existing regulatory regime with BCRA. The division of labor by which parties were the political organizations of electoral politics and groups lobbied in legislative-executive politics had clearly disappeared.

So, regulatory cycles continued to repeat themselves —legislation, adaptation, then legislative repair, and then another round of adaptation, ad infinitum. Organizations as powerful and important as political parties and groups are formidable regulatees. They are capable of mustering substantial resources and political and legal expertise, and their [90 (DEV. 1-Tab 2)] defenses are buttressed always by nationwide organizations, contacts with many members of Congress, and support in many sectors of the American electorate. Moreover, their capacity for adaptation is maximized by the medium of influence they employ. Money is by nature

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189 The CIO's Political Action Committee began operation in 1943. Political action committees must raise money only for political purposes, and they must keep it separate from the assets of the corporations, unions, or associations that sponsor them; hence the PACs of corporations and unions are legal, while the use of their parents' treasuries for electoral purposes is not.

easily transferable, completely mobile, and exchangeable for most other resources. Its fluidity quickly validates the old adage that in any transactional nexus activity flows from the more regulated portions to the less regulated ones. Thus, independent spending in campaigns gave way in the 1990s to unregulated issue advocacy, both by party committees and interest groups.

Adaptations to the regulatory regime that leave significant parts of it unregulated obviously threaten the regulatory regime and, more generally, the public sector of which it is a part. Successful avoidance leads to citizen cynicism not only about the specific regulation but also about the efficacy of the entire political system. It also generates questions about the fairness and even-handedness of public policy. As regulatory effectiveness declines, moreover, so does the will and commitment of other actors in the system to comply with the regulations. The loss of trust and confidence is a corrosive agent that no regulatory regime can long endure. Active enforcement is effective only as a supplement to the reliable self-enforcement we call compliance.

The stakes in a periodic "re-regulation" to reflect changes in activity and actors—in legislation like BCRA, that is—are very high indeed. At issue is not only the integrity of the regulation of campaign finance in federal elections and subsequent sessions of Congress, but also citizen trust and confidence in the elected officials of the United States government and in that government itself. While a Congress and a president will be legitimately concerned about the corrupting power of campaign money and its threats to [91 (DEV. 1-Tab 2)] the processes by which a representative democracy works, they must also be able to consider the very integrity and credibility of the institutions of government. Above all, they must consider the effects—both from authenticated realities and from inferences and appearances—of an

inability to bring about the changes that popular majorities clearly want (p. X-Z). To break the democratic bargain with the electorate threatens more than their reelection campaigns—it threatens the very institutions of democracy itself.

The challenge in any new regulation of political parties is to reform them without crippling them. We believe that BCRA meets that challenge. The parties have proved once again in recent years that they are resilient and flexible organizations. We hope indeed that the reforms of BCRA will induce them to revitalize local and state party organizations by recruiting new activists, by developing new and local sources of funding, and by increasing the role of party activists in the discussion of party issues. That hope springs from our belief that a reinvigoration of the broader American electorate depends first on recruiting and reinvigorating local party activists and leaders.

Similarly, the challenge of drawing a dividing line between genuine issue advocacy and electioneering is to do so without significantly reducing the ability of parties and interest groups to address policy matters of concern to them. We believe that BCRA avoids this pitfall. Examination of the actual ads sponsored by issue advocates in the last two election cycles shows that very few genuine discussions of policy matters would have been affected by BCRA, and reveals that they may steer clear of regulation without diminishing the effect of their appeals. We are less concerned about the health of interest groups than we are about the parties' health, but our hope for them is virtually identical: that they rededicate themselves to developing membership rolls and [92 (DEV. 1-Tab 2)] publicizing their agendas, freed from the need to transform themselves into campaign organizations every two years. BCRA is a reasonable first step to help parties and groups achieve these goals. By bringing both organizations' ability to sponsor

campaign ads for candidates within FECA's system, reform may nudge them back toward their historical emphasis on mobilizing citizens and activists. By restricting soft money, legislators force political organizations to reach out to a broad base of contributors to fund their electioneering, and reduce the massive contributions that create such huge ethical concerns.[190] The end result for parties and interest groups is a return to more traditional activities and away from their dedication of the last half dozen years to purchasing television commercials. We are confident this transformation will benefit political organizations and the public alike.

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[190] Soft money is banned for political parties, and others may not use corporate or union funds to finance activities treated as electioneering communications by FECA as amended by BCRA.

APPENDIX

DISCUSSION

Measuring the Impact of BCRA on Pure Issue Ads

The various attempts by different analysts working at different times to assess BCRA's impact on pure issue advocacy has created a narrow range of results and some confusion. This Appendix is written to clarify the issues involved in calculating BCRA's effect on genuine issue advocacy. In all cases, calculations of BCRA's impact are based on the 60-day window before the general election. The body of our report provides the first estimate of how incorporating the 30-day pre-primary period would alter some estimates using the 1998 data (i.e., not at all), but the 30-day period is not relevant to the methodological discussion here.

A. Impact on what?

Footnote 143 above explains that the 1998 and 2000 editions of *Buying Time* calculate the impact of BCRA in two, quite different ways. In each case, the numerator—the number of pure issue ads affected by BCRA—is identical. The difference is in the denominator. The 1998 formula uses the total number of pure issue ads aired throughout the entire year. The 2000 formula uses the total number of issue ads identifying a candidate and airing in the last 60 days. The 2000 denominator, thus includes both pure and candidate-oriented issue ads that identify a candidate and air in the last 60 days.

We argue above that the 1998 formula is the more relevant statistic to use in evaluating BCRA's effect on genuine issue advocacy, since the pivotal question is whether the BCRA's combination of criteria—the timing of ads and their use of candidates—would incorrectly subject many pure issue ads to

FECA's regulation. The meaning of the 2000 formula, on the other hand, is harder to interpret. Because it includes candidate-oriented issue ads in its calculation, it appears closer to a measure of regulatory efficiency in a given period, not a measure of the legislation's impact on pure issue advocacy.

However one interprets the 2000 formula, it is clear that as an empirical matter, combining pure and candidate-oriented issue ads in the denominator means that the results of this algorithm will vary considerably depending on how many candidate-oriented ads air during the pre-election 60 day period. The presence or absence of a presidential election weighs very heavily because of the number of issue ads that presidential candidates attract. To put it another way, imagine a single media market where, because of a lack of competitive federal elections, no candidate-oriented issue ads air. If even a single pure issue ad is subject to regulation in that market because of BCRA, the 2000 formula would peg its impact there at 100 percent—1 divided by 1—even if hundreds of other pure issue ads air before the cutoff date or do not identify a federal candidate.

B. 1998 adjustments

In reviewing previous analysis for this paper, several corrections were made.

1. "HMO said no" in Pittsburgh and Milwaukee. The most prominent pure issue ad, a spot by the AFL-CIO, lobbying specific Republican senators on Senate bill S.2330 appeared in 13 markets. Because of the similarity of all 13 versions of this ad—a perfect example of a "cookie cutter" ad—the data set includes just one storyboard. In *Buying Time 1998*, Krasno and Seltz treated all markets where a Republican senator was running for reelection in 1998 (Pittsburgh, Raleigh/ Durham, Greensboro, and St. Louis) as the subjects of this ad. Examination of materials provided by the

AFL-CIO for this litigation, however, reveals that its target in Pittsburgh (185 airings) was the state's other GOP senator, who was not a candidate for re-election in 1998. In addition, the discovery process clarified an error in the data regarding 174 airings of this ad in Milwaukee, where both senators are Democrats. The best we can determine is that another ad, not "HMO said no," aired in Milwaukee. Consistent with our treatment of missing data, therefore, we exclude it from the analysis.

Effect: Numerator = subtract 185 (from previous analysis); denominator = subtract 174.

2. "CENT/John Breaux." Senator John Breaux of Louisiana appeared in an ad advertising a teen alcohol program that aired in New Orleans two times just inside and one time just outside the 60- day period.

Effect: Numerator = add 2.

3. "CFF/Vote GOP" and "CFF/Vote GOP Reagan." An identical ad was listed under two different names in the data set. One of these ads was incorrectly listed as a party ad, but the spot comes from an interest group and is a nonpartisan reminder to vote.

Effect: 1998 Formula Denominator = add 102.

4. "CA/AVF HMO Refor." This ad refers to the state legislature in California.

Effect: 1998 Formula Denominator = subtract 11.

5. "NV/CCD Dont Be" and "PBA/This baby." No storyboards found. Treat as missing data.

Effect: 1998 Formula Denominator = subtract 71.

C. Calculating the BCRA's effect in 1998 under both *Buying Time* formulas

See attached Spreadsheets (following Tables). In both formulas, the numerator is identical: all pure issue ads (as rated by the coders) by groups that appeared within 60 days of the election and mentioned a candidate by name. In 1998, the following ads fit those criteria:

HMO said no – 3 markets (St. Louis, Raleigh-Durham, Greensboro)	455
CCS/No Matte® who	256
CENT/Breaux	2
Total =	**713**

1998 Formula Denominator (all pure issue ads):

Preliminary Total =	11939
HMO said no (Milwaukee missing data) =	-174
CFF/Vote GOP (Reagan)	+102
CA/AVF HMO Refor/NV/CCD Don't Be/PBA/This baby	-82
Final Total =	**11785**

2000 Formula Denominator (all issue ads mentioning candidates in the last 60 days):

Preliminary Total =	7200
Subtracting "HMO said no" airings where candidate not mentioned	-2353
Final Total =	**4847**

Thus, 1998 Formula = 713/11785 = **6.1%**; 2000 Formula = 713/4847 = **14.7%.**

D. The proposed FEC exceptions

The FEC is currently considering four different proposals to grant exceptions to BCRA for ads that lobby on bills before Congress. Three of the four would exclude the AFL-CIO's "HMO said no" ad from BCRA's coverage. We calculate the effect of this exclusion by adjusting the numerator in both calculations, and also the denominator in the 2000 formula. Note: "HMO said no" appeared 455 times in which candidates were mentioned.

1998 Formula = (713-455)/11785 = **2.2%**; 2000 Formula = (713-455)/(4847-455) = **5.9%**

E. Pooling the data

Since presidents and senators run every four and six years, BCRA's effect is limited to just 90 days every four or six years. As a result, it makes sense to think of its impact over a longer period than a single year. (Note that most of the officials mentioned in 1998's "HMO said no" were not candidates at the time.) Unfortunately, continuous data are not available over a longer period, but we can combine the 1998 and 2000 figures to estimate its total impact over these years. Pooling the data also has the advantage of smoothing the disruption caused by the huge volume of advertising in the presidential election. The calculation is straighforward:

1998 numerator: 713
1998 *Buying Time 1998* formula denominator: 11785
1998 *Buying Time 2000* formula denominator: 4847
2000 numerator (from Expert Report of Kenneth Goldstein): 1413

2000 *Buying Time 1998* formula denominator (from Expert Report of Kenneth Goldstein): 45001
2000 *Buying Time 2000* formula denominator (from Expert Report of Kenneth Goldstein): 60253

Buying Time 1998 Formula = (713+1413)/(11785+45001) = 2126/56786 = **3.7%**
Buying Time 2000 Formula = (713+1413)/(4847+60253) = 2126/65100 = **3.3%**

Table 1
Political Advertising Activity in the 1998 Election Cycle

	Total		Candidates		Parties		Interest Groups	
	Estimated Cost (in millions)	Count	Estimate Cost (in millions)	Count	Estimate Cost (in millions)	Count	Estimate Cost (in millions)	Count
All Political Ads	$172.8	295,625	$172.8	295,625	$172.8	295,625	$10.7	21,290
Ads Referring to Federal Candidate	$163.1	277,537	$135.3	227,561	$24.6	42,599	$3.2	7,377
Ads Referring to Senate Candidate	$99.1	153,718	$83.6	127,004	$14.8	25,274	$0.8	1,440
Ads Referring to House Candidate	$64.0	123,819	$51.7	10,557	$9.8	17,325	$2.4	5,937

Table 2:

Interest Group Broadcasts of Electioneering Communications (ads that mention a candidate and are broadcast within 60 days of the Election) in the 1998 Election

Organization	Estimated Cost (rounded to nearest thousand)	Airings
AFL-CIO	$ 1,178,000	2333
League of Conservation Voters	$ 302,000	632
Americans for Limited Terms	$ 281,000	766
Americans for Job Security	$ 248,000	201
Committee for Common Sense	$ 165,000	256
Committee for Fairness	$ 141,000	275
Campaign for America	$ 125,000	336
AMA	$ 71,000	416
Committee for Decency	$ 64,000	92
NEA	$ 57,000	129
American Association of Health Professionals	$ 54,000	77
American Values PAC	$ 21,000	55
Sierra Club	$ 3,000	4
National Pro-Life Alliance	$ 700	3
TOTAL	**$ 2,710,700**	**5575**

Note: Three additional unique advertisements, broadcast a total of 277 additional times, at an estimated total cost of $158,000 are omitted from this table because their sponsoring groups could not be positively identified.

Table 3:
Advertising Activity By Interest Groups, Parties & Candidates in 1998

			Sponsor type					
	Approximate Cost (in million)	**Total Number**	**Candidate**		**Party**		**Interest groups**	
All Political Ads								
Within 60 Days	$138.0	233789	182887	80%	40541	91%	10929	51%
Outside 60 Days	$34.9	61836	46963	20%	3944	9%	10361	49%
Ads Not Referring to Any Federal Candidate								
Within 60 Days	$4.4	7629	1958**	86%	1162	81%	4509	38%
Outside 60 Days	$4.0	7900	329**	14%	258	19%	7313	62%
Ads Referring to a Federal Candidate†								
Within 60 Days	$133.6	226160	180929	80%	39379	91%	5852	62%
Outside 60 Days	$30.8	53936	46634	20%	3686	9 %	3616	38%
Ads Referring to a Senate Candidate								
Within 60 Days	$78.6	121867	98169	77%	22363	88%	1335	93%
Outside 60 Days	$20.6	31851	28835	23%	2911	12%	105	7%
Ads Referring to a House Candidate								
Within 60 Days	$54.1	102466	82758	82%	16889	97%	2819	47%
Outside 60 Days	$9.8	21353	17799	18%	436	3%	3118	53%

** Cell comprised of Spanish language and missing data.

† Ads in the "Ads Referring to a Senate Candidate" and "Ads Referring to a House Candidate" column for each sponsor do not equal the "Ads Referring to a Federal Candidate" for the sponsor due to missing coding data as to the particular body of Congress with which a particular named candidate might be associated.

Table 4:

Concentration of Interest Groups' Candidate-Mention Advertising Broadcast within 60 Days of Elections in 1998 Senate Races[1]

Senate Race in which Candidate Is mentioned	Interest Groups		Political Parties		Candidates	
Nevada*	387	29%	1,287	6%	4,755	6%
Kentucky*	336	25%	3,939	18 %	6,743	8%
North Carolina*	325	24%	2,015	9%	10,981	13%
Missouri	211	16%	149	-%	3,542	4%
Wisconsin*	74	6%	1,084	5%	5,873	7%
Arkansas	0	0%	602	3%	1,434	2%
California*	0	0%	1,546	7%	7,884	9½%
Colorado	0	0%	219	1%	1,506	2%
Georgia	0	0%	470	2%	4,096	5%
Illinois	0	0%	647	3%	1,931	2%
Iowa	0	0%	43	-%	302	-%
Louisiana	0	0%	71	-%	529	1%
New York*	0	0%	7,728	3 5%	2 0,861	25%
Ohio	0	0%	729	3%	5,007	6%
South Carolina*	0	0%	1,390	6%	1,628	2%
Washington	0	0%	444	2%	6,279	7½%
TOTAL	1,333	100%	22,363	100%	83,351	100%

* Indicates Senate races ranked as toss-ups by the *Cook Political Report* (Oct. 20, 1998).

[1] Table includes only those states in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

Table 5:

Concentration of Interest Groups' Candidate-Mention Advertising Broadcast Within 60 Days of Elections in 1998 House Races[2]

House Race In which Candidate Is mentioned	Interest Groups		Political Parties		Candidates	
New Mexico 3*	493	22%	648	4%	1,499	3%
Michigan 8	296	13%	332	2%	367	1%
Kentucky 4*	287	13%	561	3%	1,553	3%
Kentucky 3	224	10%	168	1%	2,184	4%
Wisconsin 1*	213	9%	499	3%	1,799	4%
Utah 2	177	8%	580	4%	1,335	3%
Kentucky 6*	131	6%	478	3%	3,149	6%
Iowa 3*	129	6%	721	4%	1,392	3%
Washington 3*	124	5%	689	4%	858	2%
Michigan 10	108	5%	541	3%	646	1%
Oregon 1*	89	4%	246	2%	1,239	2%
Nevada 1*	10	-%	1,078	7%	1,383	3%
Alabama 4	0	0%	1	0%	1,496	3%
Arizona 4	0	0%	202	1%	67	-%
Arizona 6	0	0%	234	1%	1,568	3%
Arkansas 2	0	0%	459	3%	1,361	3%
Arkansas 4	0	0%	111	1%	489	1%
California 9	0	0%	134	1%	1,508	3%
Colorado 2*	0	0%	141	1%	1,632	3%

[2] Table includes only those House races in which either interest groups or political parties, or both, ran candidate-mention ads within 60 days of the elections.

[Table 5 Cont'd]

Connecticut 5*	0	0%	440	3%	871	2%
Florida 3*	0	0%	527	3%	404	1%
Idaho 1*	0	0%	824	5%	1,217	2%
Illinois 12	0	0%	224	1%	422	1%
Indiana 9*	0	0%	369	2%	1,930	4%
Indiana 10	0	0%	325	2%	1,021	2%
Kansas 3*	0	0%	424	3%	1,908	4%
Massachusetts 6	0	0%	146	1%	344	1%
Michigan 1	0	0%	66	-%	101	-%
Michigan 12	0	0%	242	2 %	1,080	2%
Minnesota 2	0	0%	42	-%	171	-%
Minnesota 6	0	0%	55	-%	50	-%
New York 29	0	0%	109	1%	2,605	5%
New York 30	0	0%	327	2%	169	-%
North Carolina 4	0	0%	393	2%	935	2%
North Carolina 12	0	0%	337	2%	385	1%
Ohio 1*	0	0%	54	-%	2,383	5%
Ohio 6*	0	0%	1,319	8%	1,633	3%
Pennsylvania 10*	0	0%	479	3%	2,384	5%
Pennsylvania 13*	0	0%	237	1%	805	2%
South Carolina 5	0	0%	54	-%	135	-%
Texas 17*	0	0%	201	1%	95	-%
Texas 24	0	0%	345	2%	245	1%
Washington 1*	0	0%	153	1%	1,358	3%
Washington 5	0	0%	17	-%	742	2%
Washington 8	0	0%	169	1%	308	1%
Wisconsin 8*	0	0%	800	5%	1,372	
TOTAL	2,281	101%†	16,501	99%†	50,598	104%†

* Indicates House races ranked as toss-ups by the *Cook Political Report* (Oct. 20, 1998).

† Does not equal 100% due to rounding.

Table 6:

Distribution of Interest Group Electioneering and Genuine Issue Ads During the 1998 Election Cycle

Month	Electioneering Ad		Genuine Issue Ad	
January	0	0%	1,356	12%
February	0	0%	1,776	15%
March	0	0%	225	2%
April	60	1%	387	3%
May	1,424	18%	161	1%
June	280	4%	402	3%
July	1,447	18%	2,186	19%
August	289	4%	731	6%
September	911	12%	3,637	31%
October/November	3,512	44%	908	8%
Total	7,923	101%	11,769	100%

Note: Excludes 22 airings with no dates listed. None of the spots with missing data identify a federal candidate.

Table 7:

Comparing Quintessential Electioneering Ads and Quintessential Issue Ads in the 1998 Election

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Candidate Mention					
% Naming Candidate	99%	89%	0%	100%	97%
Magic Words					
% Using Magic Words	4%	100%	3%	7%	1%

[Table 7 Cont'd]

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Timing					
% Run January through March	3%	0%	28%	0%	0%
% Run April through June	10%	0%	8%	0%	2%
% Run July through August*	9%	0%	26%	0%	7%
% Run 60 Days Before General Election	78%	100%	38%	100%	91%
% Run 30 Days Before General Election	59%	100%	11%	77%	73%
% Run 15 Days Before General Election	40%	86%	8%	50%	46%
Information Provided					
% Giving Toll Free Number	0%	0%	41%	47%	1%

*Includes first days of September before 60-day period begins.

[Table 7 Cont'd]

	Quintessential Electioneering Ads		Quintessential Issue Ads		
	Ads Run by Candidates (n=229,650)	Interest Group Ads with Magic Words (n=517)	Interest Group Ads with No Candidate (n=9,476)	Interest Group Ads Mentioning Candidate 60 Days Before General Election (n=5,852)	Political Party Ads (n=44,463)
Viewer Perception					
% Perceived as Electioneering	96%	90%	2%	88%	94%
% Negative	19%	62%	29%	65%	62%
% Negative for Ads Run 60 Days Before General Election	22%	62%	49%	65%	63%
% Negative for Ads Run 30 Days Before General Election	24%	62%	1%	58%	62%
% Negative for Ads Run 15 Days Before General Election	26%	55%	1%	36%	61%

SPREADSHEET: 1998 Formula

Total issue ads by groups, genuine issue ads only (q6 = 1)
who = 3 & what = 3
q6 = 1

CUSTITLE

		Frequency	
Valid	AAHP/Bash HMOs	4	
	AAHP/Its a Big D	14	
	AFBI/Im a year C	70	
	AFFT/Tax what we	1685	
	AFFT/worth a goo	617	
	AFHGO/Small Idea	4	
	AFL-CIO/Nurse 30	2	
	AFL-CIO/Nurse 60	105	
	AFL/Credit Union	7	
	AFL/Harley you h	811	
	AFL/HMO Said No	2808	Pure IA,
	AFL/Its not eas	424	some candidates
	AFL/Look out for	172	mentioned
	AFL/Make me feel	654	(see below)
	AFL/Teachers	238	
	AFL/Teachers 60	4	
	ALCC/Moral Votes	16	
	AMREN/Dont go	22	
	AMREN/No Trip to	2	
	AMREN/Time to Re	109	
	AREN/Flag	20	
	AREN/Its Time Ch	46	
	BRT/Goat	19	
	BRT/Had Enough	99	
	BRT/Much to Lear	1243	
	BRT/The Farm	266	
	CA/AVF HMO Refor	11	CA legislative
	CCS/No Matte	2	ad-to be excluded
	CCS/No Matter Wh	254	Pure IA, candidate
	CEI/All This Tal	3	mentioned
	CEI/Remember The	8	Pure IA, candidate
	CENT/John Breaux	3	mentioned
	CENTURY/Winfield	18	
	CFA/Its Hate	1	
	CFF/Vote GOP	6	

LAMAR/Extra $140	386	
LAMAR/We the Par	385	
LAMAR/Worry	40	
LIB/Who Is Reall	3	
LIBERTARIAN/Keep	1	
LIFE/MN heart be	2	
LIKE/Mother	20	
MNPROLIFE/life t	3	
NAM/We Make	26	
NET/Theyll Say	23	
NFIB/Call Cong	45	
NH/AFHGO Stop t	10	
NICAC/Impeach Cl	3	
NOPBR/No PBR Cai	147	
NV/CCD Dont Be	61	No storyboard-treated as missing data
PBA/This baby	10	No storyboard treated as missing data
PFAW/Lets Move O	240	
PFAW/Whats Happe	126	
RTL/voices in th	134	
RTL/Youll know	15	
SIERRA/Dictate a	22	
SIERRA/If your s	45	
SIERRA/Make the	148	
SIERRA/Stop GW	83	
SIERRA/World is	1	
TOB/USCC I work	7	
TRUE/Call to sto	141	
WA/AFTL Power of	45	
Total	11939	

Total issue ads by groups, candidate mentions

who = 3 and what = 3
q6 = 1
q7 < 4 or q8 < 4
date > 90498

CUSTITLE

		Frequency
Valid	AFL/HMO Said No	2808
	Note additional cases described with storyboards above	

Versions of HMO said no where candidate is mentioned
MARKETLONG

		Frequency	
Valid	ALBUQUERQUE-SANT	285	
	CINCINNATI	256	
	GREENSBORO-HIGH	118	candidate
	candidate		
	INDIANAPOLIS	261	
	LEXINGTON	120	
	LITTLE ROCK-PINE	163	
	LOUISVILLE	227	
	MILWAUKEE	174	outlier
	PITTSBURGH	185	
	PORTLAND-AUBURN	323	
	RALEIGH-DURHAM	126	candidate
	SEATTLE-TACOMA	359	
	ST LOUIS	211	candidate
	Total	2808	

Numerator = (includes HMO said no plus additional cases noted above)

CCS/No Matte	2	NV storyboard	Note: CCS is just one ad
CCS/No Matter who	254	NV storyboard	
CENT/Breaux	2		
HMO (Greensboro)	118		
HMO (Raleigh)	126		
St. Louis	211		
Total	713		

Denominator =	11939 above	
Add CFF/Vote GOP	102	miscoded airings, see Discussion
Subtract WI HMO said no	174	missing storyboard, see Discussion
Subtract CA/AVF HMO	11	CA legislative ad
Subtract NV/CCD	61	missing storyboard, see Discussion
Subtract PBA/This baby	10	missing storyboard, see Discussion
Total =	11785	

Calculation: Genuine issue ads affected / all issue ads affected

713/11785 = 0.060500636 Effect of BCRA = 6.1%

Proposed FEC exception: eliminating AFL-CIO ad from numerator by including only remaining cases

CENT/Breaux 2
CCS ad (NV) 256 (2+254)
258/11785 = 0.021892236 Effect of BCRA = 2.2%

Note: "HMO said no" also appeared 97 times in Milwaukee under idnumber = 13,an ad identical to idnumber =12, except that Sen. Snowe of Maine is the subject. Since this ad is clearly not the one that ran in Milwaukee, it and the Milwaukee airings of idnumber 12 are most appropriately treated as missing data and excluded from the analysis. This is the standard approach to missing data and the one used in Buying Time 1998.

SPREADSHEET: 2000 Formula

Total issue ads by groups, irrespective of candidate mention or date who = 3 & what = 3

CUSTITLE

		Frequency
Valid	AAHP/Bash HMOs	4
	AAHP/Its a Big D	14
	AAHP/Look Out Fo	77
	ABC/Power of One	178
	AFBI/1m a year C	70
	AFFT/Tax what we	1685
	AFFT/worth a goo	617
	AFHGO/Small Idea	4
	AFJS/Stabeno	6
	AFJS/Stabenow Tu	123
	AFL-CIO/Nurse 30	2
	AFL-CIO/Nurse 60	105
	AFL/Chavez His L	11
	AFL/Credit Union	7
	AFL/Harley you h	811
	AFL/HMO Said No	2808
	AFL/Its not eas	424
	AFL/Lock out for	172
	AFL/Make me feel	654
	AFL/PBR Call Sen	197
	AFL/PBR Call Tod	1037
	AFL/PBR Only One	254
	AFL/SS Trust Fun	575
	AFL/Teachers	238
	AFL/Teachers 60	4
	AFLCIO/Call ES	17
	AFLCIO/Strengthe	1265
	AFLT/Bob Inglis	80
	AFLT/Bobby Russe	261
	AFLT/Call WU	5
	AFLT/Call WU Rev	39
	AFLT/Goodlings r	151
	AFLT/Grave Thank	409
	AFLT/Its a crime	189
	AFLT/KY Scorsone	116
	AFLT/LA No Vitte	6
	AFLT/Maloof	169

AFLT/OR People S	45
AFLT/Scorsone an	80
AFLT/Shell game	47
AFLT/Stand Up Fo	142
AFLT/Williams Sh	143
AFTL/KY Lucas	1
AFTL/KY Stop Wil	76
AFTL/UT Cook Sig	35
AFTL/WI Tell Rya	213
AFTL/Willams is	210
ALCC/Moral Votes	16
AMREN/Dont go	22
AMREN/No Trip to	2
AMREN/Time to Re	109
AREN/Flag	20
AREN/Its Time Ch	46
AVO/Ashcroft Val	169
BBC/Vote On Nov	19
BRT/Goat	19
BRT/Had Enough	99
BRT/Much to Lear	1243
BRT/The Farm	266
CA/AVF HMO Refor	11
CCS/No Matte	2
CCS/No Matter Wh	254
CEI/All This Tal	3
CEI/Remember The	8
CENT/John Breaux	3
CENTURY/101	110
CENTURY/Talk lik	2
CENTURY/Winfield	18
CFA/Its Hate	1
CFF/My Bid Was L	61
CFF/Vote GOP	6
CFRG/KS Call Dav	26
IA/Bosewell Edu	129
LAMAR/Extra $140	386
LAMAR/We the Par	385
LAMAR/Worry	40
LIB/Who Is Reall	3
LIBERTARIAN/Keep	1
LIFE/MN heart be	2

LIKE/Mother	20
LV/CCD Look at H	48
MI/MICA Bonior L	108
MI/NA Sugars	9
MICF/Fieger Stab	167
MNPROLIFE/life t	3
NAM/We Make	26
NET/Theyll Say	23
NFIB/Call Cong	45
NH/AFHGO Stop t	10
NICAC/Impeach Cl	3
NJ/AFJS FPallone	72
NM/Davis Term Li	45
NM/DCCC Redman D	281
NOPBR/No PBR Cai	147
NPLA/Call Feingo	6
NV/CCD Dont Be	61
NV/CFCD/Not Abov	92
NV/CFF Big Spend	45
NV/CFF NV Diria	143
NV/CFF/Overtaxed	87
NV/LCV What We D	27
NY/CNYF NY needs	63
NY/NA Mother gre	40
PA/AFLT Goodling	115
PBA/This baby	10
PFAW/Lets Move O	240
PFAW/Whats Happe	126
RTL/RTL	7
RTL/voices in th	134
RTL/Youll know	15
SIERRA/Dictate a	22
SIERRA/If your s	45
SIERRA/Make the	148
SIERRA/NC Faircl	25
SIERRA/Stop GW	83
SIERRA/World is	1
TOB/NYGOV Dont	506
TOB/USCC I work	7
TRUE/Call to sto	141
UAW/Vote	8
WA/AFTL Power of	61

	WI/ LCWAF Neuman	71	
	WI/(JOE) Casino	162	
	Total	20755	

Total issue ads by groups, candidate mentions only
who = 3 and what = 3
CUSTITLE q7 < 4 or q8 <4& what = 3

		Frequency	
Valid	AAHP/Look Out Fo	77	
	AFJS/Stabeno	6	
	AFJS/Stabenow Tu	123	
	AFL/Chavez His L	11	
	AFL/HMO Said No	2808	genuine issue ad -
	AFL/PBR Call Sen	197	some versions
	AFL/PBR Call Tod	1037	with candidates
	AFL/PBR Only One	254	
	AFL/SS Trust Fun	575	
	AFLCIO/Call ES	17	
	AFLCIO/Strengthe	1265	
	AFLT/Bob Inglis	80	
	AFLT/Bobby Russe	261	
	AFLT/Call WU	5	
	AFLT/Call WU Rev	39	
	AFLT/Goodlings r	151	
	AFLT/Grave Thank	409	
	AFLT/Its a crime	189	
	AFLT/KY Scorsone	116	
	AFLT/LA No Vitte	6	
	AFLT/Maloof	169	
	AFLT/OR People S	45	
	AFLT/Scorsone an	80	
	AFLT/Shell game	47	
	AFLT/Stand Up Fo	142	
	AFLT/Williams Sh	143	
	AFTL/KY Lucas	1	
	AFTL/KY Stop Wil	76	
	AFTL/UT Cook Sig	35	
	AFTL/WI Tell Rya	213	
	AFTL/Willams is	210	
	AVO/Ashcroft Val	169	
	CCS/No Matte	2	genuine issue ad

	CCS/No Matte Wh	2	genuine issue ad- identified to are above
	CENT/John Breaux	3	genuine issue ad
	CFRG/KS Call Dav	26	
	IA/Bosewell Edu	129	
	MI/MICA Bonior L	108	
	MICF/Fieger Stab	167	
	NJ/AFJS FPallone	72	
	NM/DCCC Redman D	281	
	NPLA/Call Feingo	6	
	NV/CFCD/Not Abov	92	
	NV/CFF Big Spend	45	
	NV/CFF NV Diria	143	
	NV/CFF/Overtaxed	87	
	NV/LCV What We D	27	
	PA/AFLT Goodling	115	
	SIERRA/NC Faircl	25	
	WI/ LCWAF Neuman	71	
	WI/(JOE) Casino	162	
	Total	10771	

Total issue ads by groups, candidate mentions only
and post 9/3 who = 3 and what = 3
CUSTITLE q7 <4 or q8 <4
date > 90398

		Frequency	
Valid	AAHP/Look Out Fo	77	
	AFJS/Stabeno	6	
	AFJS/Stabenow Tu	123	
	AFL/Chavez His L	11	
	AFL/HMO Said No	2808	genuine issue ad-
	AFL/PBR Call Tod	10	some versions with
	AFL/SS Trust Fun	575	candidate
	AFLCIO/Call ES	17	
	AFLCIO/Strengthe	1265	
	AFLT/Call WU	5	
	AFLT/Call WU Rev	39	
	AFLT/OR People S	45	
	AFLT/Stand Up Fo	142	
	AFTL/KY Lucas	1	
	AFTL/KY Stop Wil	76	
	AFTL/UT Cook Sig	35	

AFTL/WI Tell Rya	213	
AFTL/Willams is	210	
AVO/Ashcroft Val	55	
CCS/No Matte	2	genuine issue ad
CCS/No Matter Wh	254	genuine issue ad -
CENT/John Breaux	2	identical to one
IA/Bosewell Edu	129	above
MI/MICA Bonior L	108	genuine issue ad -
MICF/Fieger Stab	167	two showings after
NJ/AFJS FPallone	72	9/3
NM/DCCC Redman D	281	
NPLA/Call Feingo	3	
NV/CFCD/Not Abov	92	
NV/CFF Big Spend	45	
NV/CFF NV Diria	143	
NV/CFF/Overtaxed	87	
NV/LCV What We D	27	
SIERRA/NC Faircl	4	
WI/ LCWAF Neuman	71	
Total	7200	Denominator = 7200

idnumber = 12

HMO said no

MARKET LONG		Frequency	Percent	Valid Percent	Cumulative Percent	
Valid	ALBUQUERQUE-SANT	285	10.15	10.15	10.15	
	CINCINNATI	256	9.12	9.12	19.27	
	GREENSBORO-HIGH	118	4.20	4.20	23.47	candidate
	INDIANAPOLIS	261	9.29	9.29	32.76	
	LEXINGTON	120	4.27	4.27	37.04	
	LITTLE ROCK-PINE	163	5.80	5.80	42.84	
	LOUISVILLE	227	8.08	8.08	50.93	
	MILWAUKEE	174	6.20	6.20	57.12	outlier
	PITTSBURGH	185	6.59	6.59	63.71	
	PORTLAND-AUBURN	323	11.50	11.50	75.21	
	RALEIGH-DURHAM	126	4.49	4.49	79.70	candidate
	SEATTLE-TACOMA	359	12.78	12.78	92.49	
	ST LOUIS	211	7.51	7.51	100.00	
	Total	2808	100.00	100.00		candidate

Numerator =

CENT/Breaux	2		
CCS/No Matte	2		
CCS/No Matter who	254		
HMO (Greensboro)	118	AFL ad only:	118
HMO (Raleigh)	126		126
HMO (St Louis)	211		211
Total	711		455

Denominator = 7200 see above

Adjusting denominator: Eliminate HMO said no where candidates not mentioned

Total HMO said no	2808	
Subtract candment	455	
Total	2353	
Total showings	7200	see above
Subtract HMO said no	2353	
Total	4847	

Calculation: Genuine issue ads affected / all issue ads affected

713/4847 = 0.1471013 Effect of BCRA (2000 BT formula) = 14.7%

Proposed FEC exception: eliminating AFL-CIO ad

Numerator - 455	258
Denominator - 455	4392

256/4392= 0.05874 Effect of BCRA (2000 BT formula) = 5.9%

Note: "HMO said no" also appeared 97 times in Milwaukee under idnumber = 13, an ad identical to idnumber + 12, except that Sen. Snowe of Maine is the subject. Since this ad is clearly not the one that ran in Milwaukee, it and the Milwaukee airings of idnumber 12 are most appropriately treated as missing data and excluded from the analysis. This is the standard approach to missing data and the one used in *Buying Time* 1998.